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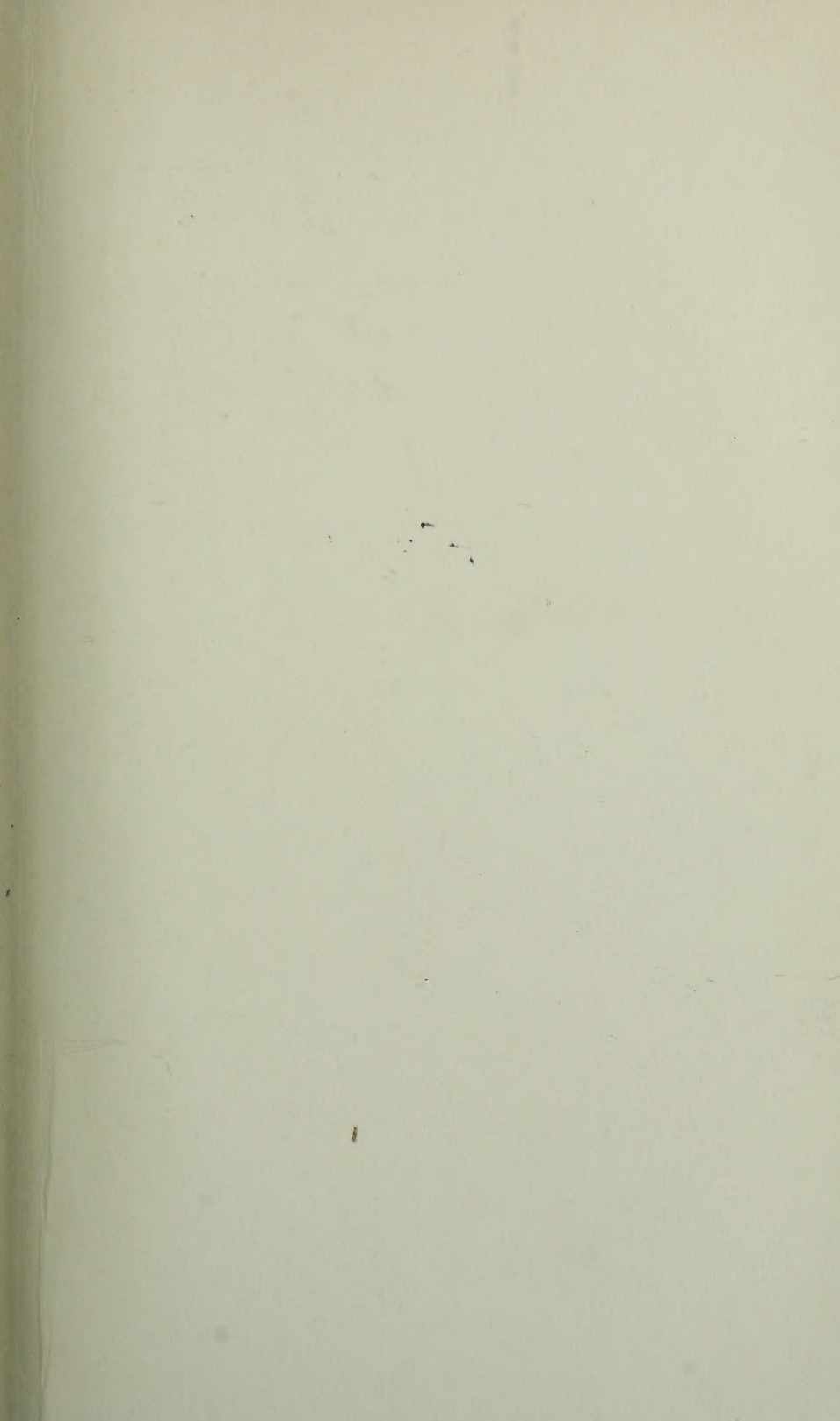
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No. 12593 2651

**United States
Court of Appeals**
for the Ninth Circuit.

NELDA SHANAHAN,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY,

Appellee.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 346)

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

OCT 31 1950

PAUL R. O'BRIEN,

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

CLERK

No. 12593

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NAMES AND ADDRESSES OF ATTORNEYS

DAN HADSELL, ESQ.,

SIDNEY P. MURMAN, ESQ.,

HADSELL, SWEET, INGALLS &
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405 Montgomery Street,
San Francisco, California,

Attorneys for Plaintiff and Appellant.

A. B. DUNNE, ESQ.,

DUNNE & DUNNE, ESQS.,

333 Montgomery Street,
San Francisco, California,

Attorneys for Defendant and Appellant
Southern Pacific Company, a corpora-
tion.

In the Southern Division of the United States District Court for the Northern District of California

No. 28770-G

NELDA SHANAHAN,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, FIRST DOE, SECOND DOE and THIRD DOE,

Defendants.

COMPLAINT
(Wrongful Death)

Plaintiff complains of defendants and for cause of action alleges:

I.

At all times herein mentioned defendant Southern Pacific Company was and now is a corporation organized and existing under and by virtue of the laws of Kentucky, authorized to transact business in California, and operating a system of railways within California.

II.

At all times herein mentioned defendants First Doe, Second Doe and Third Doe, and each of them, were agents and employees of defendant corporation.

III.

The names of defendants First Doe, Second Doe and Third Doe are fictitious names and plaintiff prays that at such time as the true names of each

of said defendants, so named, are ascertained, plaintiff have leave of court to amend this complaint accordingly.

IV.

Plaintiff is the widow of one Ellis E. Shanahan and the sole heir at law of said Ellis E. Shanahan, deceased.

V.

On or about December 27, 1948, shortly before 8:00 o'clock a.m. of said day, said Ellis E. Shanahan was operating a certain automobile along Howard Street, a public street and thoroughfare in the vicinity of the tracks and right-of-way of defendant corporation in Anderson, California.

At about said time and place, defendants so maintained and operated the crossing signal and vehicle warning device of defendant corporation in such a careless, reckless and negligent manner as to cause a certain locomotive and train of defendant corporation, then and there carelessly, recklessly and negligently proceeding in a southerly direction along said tracks and right-of-way, to strike and collide without warning with said automobile, with great force and violence, demolishing said automobile and causing said Ellis E. Shanahan, the operator thereof, to receive and sustain serious bodily injuries, from which injuries said Ellis E. Shanahan died.

VI.

As a proximate result of the death of said Ellis E. Shanahan, plaintiff was and has been deprived of the support, maintenance, society and comfort of

said deceased and was and has been thereby damaged in the sum of Seventy-five Thousand Dollars (\$75,000.00).

VII.

By reason of the death of said Ellis E. Shanahan, plaintiff was compelled to and did incur certain necessary expenses to date incident to said fatal injuries and said death, the exact amount of which is not presently known.

VIII.

All of said damages resulted solely and proximately from the carelessness, recklessness and negligence of defendants as hereinabove alleged.

Wherefore, plaintiff prays judgment against defendants for general damages in the amount of \$75,000.00, special damages incurred, costs of suit, and such other and further relief as is meet and proper in the premises.

HADSELL, SWEET, INGALLS
& MURMAN,

/s/ SIDNEY P. MURMAN,
Attorneys for Plaintiff.

[Endorsed]: Filed April 6, 1949.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Comes Now, Southern Pacific Company, a Delaware corporation (incorrectly named in the complaint as a Kentucky corporation), one of the defendants above named, and answering the complaint of plaintiff on file herein, shows as follows:

I.

At all times mentioned in the complaint and herein defendant Southern Pacific Company was a corporation organized and existing under and by virtue of the laws of the State of Delaware, with a principal place of business in the State of California, in the City and County of San Francisco, and was qualified to do business and doing business, and operating a railway system in the State of California and other States. On December 27, 1948, at approximately 7:45 a.m., Ellis E. Shanahan was driving and operating a certain automobile in a general westerly direction on Howard Street, a public street in Anderson, California, and defendant Southern Pacific Company was operating a certain train in a general southerly direction along the railroad tracks. As said train approached the intersection of said Howard Street and said railroad tracks, Ellis E. Shanahan drove said automobile upon said tracks and collided with the locomotive of said train. J. A. Steinbrock, the engineer, and Philip S. Kofer, the fireman of said train, were employed by defendant Southern Pacific Company.

In said collision, Ellis E. Shanahan was immediately killed, and said automobile was demolished. At the time that Ellis E. Shanahan so drove said automobile on to said tracks, said crossing was protected by certain warning signals which were operating properly according to their construction and design, and actuated by the approach of said train.

II.

Defendant Southern Pacific Company is without information or belief on the subject sufficient to enable it to answer the allegations of Paragraphs IV, VI and VII, or the allegations of Paragraphs II and III of the complaint in respect of fictitiously named persons or defendants, and on such ground denies each and every such allegation. Defendant Southern Pacific Company denies each and every allegation of the complaint not hereinabove admitted or denied, and denies that it, or any of its officers, agents, servants or employees was negligent in the premises, or in respect of any matter alleged in the complaint, and denies that any negligence thereof was a cause, proximate or otherwise, of said accident or of the injuries or damages, if any, alleged in the complaint.

And For a Second, Separate and Independent Answer and Defense to the complaint, and to each alleged cause of action thereof, defendant Southern Pacific Company shows as follows:

I.

Defendant here repeats and alleges all of the mat-

ters set forth in Paragraph I of the first answer and defense above, and incorporates them herein by reference the same as though fully set forth at length. Ellis P. Shanahan was negligent in these matters set forth in the complaint, and negligently drove, operated, maintained and controlled said automobile, and negligently disregarded warnings of the approach of said train, with the result that said automobile collided with said locomotive of said train. Said conduct of Ellis P. Shanahan, as aforesaid, proximately caused and contributed to said accident, and to the injuries and damages, if any, alleged in the complaint.

And for a Third, Separate and Independent Answer and Defense to the compliant, defendant Southern Pacific Company shows as follows:

I.

Defendant here repeats and alleges all of the matters set forth in paragraph 1 of the first answer and defense above, and incorporates them herein by reference the same as though fully set forth at length. Ellis P. Shanahan was negligent in those matters set forth in the complaint, and negligently drove, operated, maintained and controlled said automobile, and negligently disregarded warnings of the approach of said train, with the result that said automobile collided with the locomotive of said train. Said conduct of Ellis P. Shanahan was the sole cause, and the sole proximate cause of said

accident, and of the injuries and damages, if any, alleged in the complaint.

Wherefore, defendant Southern Pacific Company, a corporation, prays that plaintiff take nothing by her complaint on file herein; that defendant have judgment for its costs of suit incurred herein, and for such other, further, and different relief as, the premises considered, is proper.

/s/ A. B. DUNNE,

DUNNE & DUNNE,

Attorneys for Defendant

Southern Pacific Company.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 15, 1949.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Defendant.

/s/ M. J. LANNES,

Foreman.

[Endorsed]: Filed December 30, 1949.

In the Southern Division of the United States District Court for the Northern District of California

No. 28770-G

NELDA SHANAHAN,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Defendant.

JUDGMENT ON VERDICT

This cause having come on regularly for trial on the 19th day of December, 1949, before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues joined herein; Sydney Murman, Esq., appearing as attorney for plaintiff, and Mitchell Boyd, Esq., appearing as attorney for defendant, and the trial having been proceeded with on the 19th, 21st, 22nd, 27th, 28th, 29th and 30th days of December in said year, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court having been submitted to the Jury and the Jury having subsequently rendered the following verdict, which was ordered recorded, viz.: "We, the Jury, find in favor of the Defendant, M. J. Lannes, Foreman," and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action, and that defendant go hereof without day, and that said defendant do have and recover of and from plaintiff its costs herein expended taxed at \$.

Dated: January 3, 1950.

/s/ C. W. CALBREATH,
Clerk.

Entered in civil docket, January 3, 1950.

[Endorsed]: Filed January 3, 1950.

[Title of District Court and Cause.]

NOTICE

To Messrs. Hadsell, Sweet, Ingalls & Murman, 405
Montgomery Street, San Francisco 4, California.

Messrs. Dunne & Dunne, 333 Montgomery
Street, San Francisco 4, California.

You Are Hereby Notified that on January 3, 1950, a Judgment on Verdict was entered of record in this office in the above-entitled case.

San Francisco, California, January 3, 1950.

C. W. CALBREATH,
Clerk, U. S. District Court.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Now comes plaintiff above-named and moves this court for an order setting aside the verdict and judgment entered herein on December 30, 1949, and for a further order granting a new trial in the above-entitled cause for the following reasons:

(1) Irregularity in the proceedings of the court by which plaintiff was prevented from having a fair trial.

(2) Irregularity in the proceedings of the jury by which plaintiff was prevented from having a fair trial.

(3) Irregularity in the proceedings of the adverse party by which plaintiff was prevented from having a fair trial.

(4) Orders of the court by which plaintiff was prevented from having a fair trial.

(5) Abuse of discretion by which plaintiff was prevented from having a fair trial.

(6) Misconduct of the jury.

(7) Surprise which ordinary prudence could not have guarded against.

(8) Newly discovered evidence material to plaintiff which plaintiff could not, with reasonable diligence, have discovered and produced at the trial.

(9) Insufficiency of the evidence to justify the verdict.

(10) Errors in law occurring at the trial and excepted to by the plaintiff.

(11) Errors in the court's instructions.

(12) Verdict for the defendant is contrary to law and against the evidence.

Except where affidavits are required, said motion will be based upon all the files, records and minutes of the court in said action.

Dated: January 5, 1950.

HADSELL, SWEET, INGALLS
& MURMAN,

/s/ SYDNEY P. MURMAN,
Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 9, 1950.

District Court of the United States, Northern District of California, Southern Division

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 28th day of April, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Herbert W. Erskine,
District Judge.

[Title of Cause.]

PLAINTIFF'S MOTION FOR A NEW
TRIAL DENIED

Plaintiff's motion for a new trial heretofore having been submitted to the Court for consideration and decision, now, due consideration having been had, it is Ordered that said motion be and the same is hereby denied.

[Title of District Court and Cause.]

NOTICE

To Messrs. Hadsell, Sweet, Ingalls & Murman, Attorneys, 405 Montgomery Street, San Francisco, Calif.

Messrs. Dunne, Dunne & Phelps, Attorneys, 333 Montgomery Street, San Francisco, Calif.

You Are Hereby Notified that on April 28, 1950, Judge Herbert W. Erskine denied the motion for new trial in the captioned case.

San Francisco, California, May 1, 1950.

C. W. CALBREATH,
Clerk, U. S. District Court.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO UNITED STATES
COURT OF APPEALS

Pursuant to Rule 73, R. C. P., notice is given that plaintiff appeals to the United States Court of Appeals for the Ninth Circuit from the judgment on verdict entered herein by the above-entitled court on January 3, 1950, in favor of defendant Southern Pacific Company and against plaintiff.

Dated: May 22, 1950.

/s/ DAN HADSELL,

/s/ SYDNEY P. MURMAN,

HADSELL, SWEET, INGALLS
& MURMAN,

Attorneys for Plaintiff.

[Endorsed]: Filed May 22, 1950.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That We, Nelda Shanahan, an individual, as Principal, and The Fidelity and Casualty Company of New York, a body corporate, duly Incorporated under the laws of the State of New York and authorized to act as surety under the act of Congress approved August 13, 1894, as amended by the act of Congress approved March 23, 1910, whose principal office is located in the City of New York, and authorized to act as surety in the State of California, as Surety, are held and firmly bound unto the above-named defendants in the sum of Two Hundred Fifty and No/100ths (\$250.00) Dollars, lawful money of the United States of America, to which payment well and truly to be made we bind ourselves, jointly and severally, our successors and assigns, firmly by these presents.

Sealed with our seals, signed and dated this 17th day of May, 1950.

Whereas, the above-named plaintiff, Nelda Shanahan, has petitioned for and been allowed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from an order entered in said cause January 3, 1950;

Now, Therefore, the Condition of This Obligation is such that if the said plaintiff, Nelda Shanahan, shall prosecute its appeal to effect, and answer all costs if it fail to make its plea good, then this obli-

gation to be void; otherwise in full force and virtue.

It is expressly agreed by the surety hereto that, in case of a breach of any condition hereof, the above-entitled court may, on notice to said surety of not less than ten days, proceed summarily in the above-entitled action to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against it, and award execution therefor.

NELDA SHANAHAN,

By /s/ NELDA SHANAHAN,
Principal.

THE FIDELITY AND
CASUALTY COMPANY OF
NEW YORK,

[Seal] By /s/ F. M. REIMERS,
Its Attorney,
Surety.

State of California,
City and County of San Francisco—ss.

On this 17th day of May, in the year One Thousand Nine Hundred and Fifty, before me, C. J. Treganowen, Notary Public in and for the said City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared F. M. Reimers, known to me to be the Attorney of The Fidelity and Casualty Company of New York, the Corporation that executed the within instrument, and known to me to be the person who executed the

said instrument on behalf of the Corporation therein named and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in the County of San Francisco, the day and year in this certificate first above written.

[Seal] /s/ C. J. TREGANOWEN,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires October 26, 1952.

[Endorsed]: Filed May 22, 1950.

In the Southern Division of the United States District Court for the Northern District of California

Before: Hon. Herbert W. Erskine,
Judge.

No. 28770

NELDA SHANAHAN,

Plaintiff,

vs.

SOUTHERN PACIFIC RAILROAD CO.,
a Corporation,

Defendant.

PARTIAL REPORTER'S TRANSCRIPT

Monday, December 19, 1949

Appearances:

SYDNEY MURMAN, ESQ.,

For the Plaintiff.

MITCHELL BOYD, ESQ.,

For the Defendant.

Mr. Boyd: If your Honor please, as I stated to Judge Goodman this morning, we are not ready to proceed to trial at this time. Mr. Dunne, who is to try this case, as I told Judge Goodman, went to trial last week in the murder case of the State Court, which will be finished Wednesday possibly. Mr. Phelps of our office is in Sacramento on a criminal

matter and we, as I told Judge Goodman, are not ready to proceed at this time with this case. I don't think jury cases are usually tried this week, either in State or Federal courts, and we are right at this time—I can proceed with the empanelling of the jury this morning. I am not familiar with the case. I spent last week myself in the State court. I don't know whether your Honor wants to proceed with the case at this time or whether——

The Court: If Judge Goodman has sent it over here to this Court to try, I am really all ready to proceed, and I think we could empanel the jury and perhaps we could be ready tomorrow or tomorrow afternoon.

Mr. Boyd: Mr. Dunne won't, your Honor. The testimony is to close today. He would possibly be ready Wednesday. He wants to try the case because he is the man in the office who is prepared in the case and ready to try it. Mr. Phelps won't be back from Sacramento until tomorrow.

Mr. Murman: If the Court please, I had no warning of the case not going forward this morning. I have five [1*] witnesses from Redding. I represent a widow, and she has been put to considerable expense to bring witnesses from Redding this morning. Mr. Boyd and myself have had some consultation about the case back in October. It will be a great expense to the plaintiff if we don't go forward.

Mr. Boyd: That is a matter of expense. That could be taken care of.

Mr. Murman: We are ready to go. We have

* Page numbering appearing at top of page of original Reporter's Transcript.

our witnesses. It has been great expense to the plaintiff to bring them here and we are prepared to go forward this morning.

The Court: You submitted all these issues to Judge Goodman already?

Mr. Boyd: I submitted them this morning, and Judge Goodman said we were to take it up with your Honor.

The Court: Would it be all right with you, Mr. Murman, to empanel the jury and continue the matter until Wednesday? How long will it take?

Mr. Boyd: It is a crossing accident case. I estimated to Judge Goodman last week when we had a discussion as to whether it should go forward this morning; it would take possibly three days at the most, if that.

The Court: That would be Wednesday, Thursday and Friday.

Mr. Boyd: Yes, it would, and could terminate by Friday.

The Court: The additional cost of witnesses, bring [2] your witnesses back for Wednesday. I can assess against the defendant.

Mr. Boyd: That would be agreeable.

Mr. Murman: That would be helpful.

The Court: We will go ahead with the selection of the jury now. There is no use bringing all these ladies and gentlemen back again; might as well only bring twelve back; go ahead with the selection of the jury and continue the matter until Wednesday morning at 9:30 and get a good start.

Mr. Boyd: It is possible three days may dispose

of it. I am inclined to doubt it. Mr. Murman has five witnesses. We have possibly twice that number of witnesses. I think maybe the matter would not be concluded before Christmas and I hate to keep the jury here.

Mr. Murman: We are ready to go this morning, and have had quite a bit of cost about the matter.

The Court: We will select the jury now and continue the jury until Wednesday, and if we can't get through by Christmas we will have to put it over until after Christmas. Call the jury.

(Thereupon, a jury was empanelled and sworn.)

The Court: I want to say in this case if there is additional cost of these witnesses returning in connection with this postponement I want the defendant to pay those costs. [3]

Mr. Boyd: We will, your Honor, no question about that. We are embarrassed that this happened. We tried to explain to Judge Goodman a couple of weeks ago this would probably happen, and with the Cooley case—we were to proceed to trial on the 12th, and then His Honor shoved the Cooley case ahead and had to change plans.

Mr. Murman: Of course, we originally asked for the 19th and Judge Goodman said he couldn't try it on the 19th, but would on the 12th; then when it couldn't go on on the 12th it was placed on the 19th.

The Court: I am sympathetic with lawyers that find themselves in those cases, that is why I gave you the order.

Mr. Murman: If I had got any notice Friday maybe we could have done something about it. [4]

Wednesday, December 21, 1949

(A jury was duly impanelled and sworn and the following proceedings were had.)

The Court: Stipulate all the jurors are present.

Mr. Murman: Yes, your Honor.

The Court: Will you stipulate that hereafter so that I don't have to repeat it?

Mr. Phelps: Certainly, unless one of us calls attention to the fact that one of the jurors is absent.

The Court: I want to say, ladies and gentlemen of the jury, I asked you to be here at 9:30 and I was here at 9:30 so that we could convene, but one of the jurors was not here and has kept us all waiting. Now, I am sorry about it, but it wasn't the fault of anybody but the one juror; and hereafter when we fix an hour or time for commencement of the session, if it is not agreeable to anyone I don't mind your asking me, but I would like to have you here at the time specified. We have lost 20 minutes in the trial of this case. Will you proceed with your opening statement?

Mr. Murman: Yes, your Honor.

Mr. Phelps: May it please the court, I am sorry to interrupt, but I was about to say I would like to request an order excluding witnesses.

The Court: All right.

Mr. Murman: May I have Mrs. Shanahan remain in the court room?

Mr. Phelps: Certainly.

The Court : All right.

Mr. Murman: Will plaintiff's witnesses—will there be a place outside the court room for them to remain?

The Crier: Yes.

(The witnesses left the court room.)

Opening Statement on Behalf of Plaintiff

Mr. Murman: If the Court please, and ladies and gentlemen of the jury, it now becomes the duty of plaintiff's attorney to outline to you ladies and gentlemen what the plaintiff expects to prove in this case. The scene of this accident is laid in the northern part of the Sacramento Valley, the little town of Anderson, a rather small hamlet between Redding and Red Bluff, about 11 miles south of Redding, I believe. The time is about a year ago, the first working day after Christmas. On that particular day the crack Southern Pacific passenger train, the Beaver, was going through the black, dark, misty morning toward San Francisco at a rate of about 70 miles an hour. The train was about half an hour late. It had gone through Redding on its way south and was due to pass through Anderson.

As the train came towards Anderson, a freight train went on the siding on the west siding of Anderson. I have here a map of the area of this accident. Perhaps this will be of some help if I talk in part from this map. To explain the map, ladies and gentlemen of the jury, we have an arrow that

points generally in a northerly direction. Of course, south is generally to the left of the map, as you look at it, north is generally to the right of the map as you look at it; west is generally to the top, and east is generally to the bottom.

As I said, this train, the Beaver, No. 13, was speeding on its way to San Francisco, and the main line track of the Southern Pacific through the town of Anderson is the center track, as shown here on this map. At the time that the train approached Anderson there was a freight train on this west siding, east and west, was stretched across the North Street crossing and Ferry Street crossing.

It was a misty morning, requiring the use of windshield wipers. It was also daylight saving time, so that the times in this case are generally one hour different from the standard time, which would be an hour earlier.

As this train approached Anderson, Mr. Shanahan arose to go to work. He was a zone deputy collector of the Internal Revenue Department. His place of business was in the vicinity of Anderson, but the main office was in Redding. He left Mrs. Shanahan somewhere around 9:30, daylight saving time, on that morning, normally 6:30. He came from his home in the general direction of East Center Street, with the intention, apparently, of crossing the tracks to West Center Street, which is Highway 99, to go north to Redding. Beyond that we don't know much about what Mr. Shanahan did that morning. We shall show by other witnesses, since Mr. Shanahan was killed, that Mr. [4] Shana-

han was killed, that Mr. Shanahan was seen right at the vicinity of the Southern Pacific depot, just about opposite Howard Street. At that time he was driving a Plymouth coupe automobile—I believe it was a Plymouth—and he was seen to turn and go in the direction of the Howard Street crossing.

We shall show that as he approached the crossing he slowed down and came to a stop just about at the point where the railroad right-of-way line crosses the Center Street crossing area. We shall show that he was seen at that point to wipe the inside of his windshield, it being a cold, misty morning; apparently some steam had gotten on them, and that he remained stopped there for about a minute or so; that this was about a quarter of eight, daylight saving time, normally a quarter of seven. After remaining stopped there and going through the motion of wiping his windshield, he slowly went forward over the crossing. We will show as he got on the east track there suddenly appeared a light beam, and as he went a little bit further, that is, as he went from the east track to the west track and was on the west track—that is, the main-line track—there was a whistle blown, and that a train hit the car and it was thrown 40 feet down the right-of-way and demolished, and Mr. Shanahan was thrown 120 feet down the right-of-way and killed instantly.

Ladies and gentlemen, we shall show that there is a wig-wag at this point where I am about placing the pointer, [5] an ordinary wig-wag signal, and

that the witnesses who saw Mr. Shanahan at the time, as I have just outlined to you, did not see a wig-wag in operation. We shall show that there is a double flash signal up at this intersection which was in operation. It is a signal that had two red flashing lights that flash alternately; however, that it could not be used because the freight train was across the track. We shall show from the point Mr. Shanahan stopped and wiped his windshield that the visibility of the track is impaired by the depot. In other words, although he stopped up at the main track and apparently looked and listened, he could not see far enough up the main track to see up in the area to the north part of town.

Now, we shall show that Mr. Shanahan, as I said, was a deputy zone collector of the Internal Revenue Department and that he was earning approximately \$4100 a year. We shall show that Mr. Shanahan had been married for many years and that Mrs. Shanahan was dependant upon him for her support. We shall show that at the time he was killed he was earning the amount which I have stated to you, and that his life expectancy was approximately 18 years had he lived; that he was about at that time 55 years of age. We shall show that Mrs. Shanahan is of the age of 43 and that her life expectancy was longer than his, of course. We shall show that, by virtue of his death, under the circumstances, the circumstances which I have mentioned here, 'the wig-wag signal was not operating and [6] he came to a stop and apparently looked and listened as he would be required to do in the use of ordinary care.

We shall show you that Mr. Shanahan was deprived of his earnings for that period, which would approximately be \$76,000 had he lived out his life. In that connection we shall show you he had a civil service rating with the United States Government and that he normally would have been employed throughout the balance of his life expectancy, up to the age of 70, at least, at which time, as any Federal employee is required, he would retire and take a pension. However, he had some 15 years ahead of him before he would have reached that age.

Having shown you those facts, ladies and gentlemen, we will ask you of course to bring in a verdict for the plaintiff in the amount of damages which she is claiming, namely, \$75,000.

This is a wrongful death action and it is incumbent upon the plaintiff—we will shoulder the burden of proof to show, first of all, that the defendant here was negligent in the operation of its train, and the crossing signal was not operating at the time; furthermore, that by virtue of Mr. Shanahan's death, Mrs. Shanahan has suffered pecuniary loss, not only from earnings but from the loss of companionship and his living with her for the balance of their lives. That, ladies and gentlemen, is briefly what the plaintiff expects to prove in this case. [7]

The Court: Do you want to make an opening statement now?

Mr. Phelps: If the court please, I should like to reserve my opening statement until the close of the plaintiff's case. Apparently—you recall the jury was selected when I was not here, but I presume the

court advised the jury that in the ordinary procedure plaintiff puts on his case first, then the defendant puts on his case. I would like to reserve my opening statement until that time. Thank you.

Mr. Murman: If the court please, a Mr. Wickfield has come into the courtroom. I do not intend to use him as a witness on plaintiff's case. I was conferring with Mr. Phelps as to whether he could remain. Mr. Phelps has no objection to his remaining in the court room, if the court please.

Mr. Phelps: That is right, your Honor.

Mr. Murman: Plaintiff will call Mr. Hendrix.

TOMMY A. HENDRIX

a witness called on behalf of the plaintiff, sworn.

The Clerk: State your name to the court and jury, please. A. Tommy A. Hendrix.

Direct Examination

By Mr. Murman:

Q. You have appeared here, have you, in response to a subpoena which has been issued by the plaintiff? A. Yes. [8]

Q. Where do you live, Mr. Hendrix?

A. I Anderson, California.

Q. How long have you lived in Anderson?

A. Since 1945.

Q. Prior to that did you live somewhere else?

A. I was in the service.

Q. What is your business?

A. Lumber grader.

(Testimony of Tommy A. Hendrix.)

Q. Where are you employed?

A. Fir and Pine Planing Mill.

Q. Where is that? A. In South Redding.

Q. Where is Redding in connection with Anderson?

A. About 11 miles north of Anderson.

Q. You had to go from Anderson to Redding to work, is that right? A. That is right.

Q. Did you know Mr. Shanahan, the husband of the plaintiff in this case? A. Yes, I did.

Q. How long had you known him prior to his death?

A. I knowed him since the latter part of 1945.

Q. About how old would you say he was?

A. I would say he was between 45 and 50.

Q. Did he seem to be in apparent good health? A. Yes.

Mr. Phelps: I object to that, calling for a conclusion of the witness. You can possibly get that some other way. This witness, what does he know about it?

Mr. Murman: Well, he knew him five years. I think he is competent to testify how he appeared, your Honor.

The Court: Yes, I think so.

Q. (By Mr. Murman): Will you answer the question, Mr. Hendrix? A. Pardon?

Q. Will you answer the question? Was he in apparently good health?

A. Yes, he seemed to be in very good health.

Q. When did you last see him before his death?

(Testimony of Tommy A. Hendrix.)

A. It was about a week before. It was the week before he was killed, on a Saturday. We were out at a pinochle party——

Q. Never mind where you were at, but you saw him at that occasion? A. Yes.

Q. At that time he was in apparently good health? A. Yes.

Q. Do you recall December 27, 1948?

A. Yes, sir.

Q. Where were you on the morning of that day?

A. I was going to work.

Q. Where were you before you left for work? [10] A. At home.

Q. About what time did you leave your home?

A. About 7:30.

Q. Was that standard time or daylight saving time? A. Daylight saving time.

Q. Normally it would be an hour early, is that correct? A. That is right.

Q. Was it dark at the time you left home?

A. Yes, it was dark.

Q. How did you leave your home, in an automobile or how? A. In my own automobile.

Q. Which side of the railroad tracks was your home on, was your home located on at that time?

A. It would be on the east side of the railroad tracks.

Q. So that how did you go from Anderson to Redding? A. On Highway 99.

Q. Which side is Highway 99 on?

(Testimony of Tommy A. Hendrix.)

A. The west side.

Q. So you had to cross the track?

A. That is right.

Q. As a matter of fact, when you left home in the dark at about 7:30 of that morning, how was the weather?

A. It was dark, it was misty.

Q. When you say misty, what do you mean?

A. Kind of stormy. [11]

Q. Did you have to use your windshield wiper?

A. Yes, I did.

Q. Was it cold?

A. Well, it was cold enough I had my defroster going on the inside of the car to keep it from steaming up.

Q. Coming from home at what part of Center Street do you cross the tracks?

A. I went up Howard Street to North Street and was going to cross the railroad tracks at North Street.

Q. Do you mean by that you came up Howard Street to Center Street and went north on Center Street to North Street?

A. That is right, up to the North Street crossing.

Q. What did you see there?

A. As I started north there on to the crossing there was a railroad train along there blocking—it was blocked by a freight train.

Q. Where was the freight train with respect to the track? By the way, how many tracks are there at the North Street crossing?

(Testimony of Tommy A. Hendrix.)

A. There are three there.

Q. Three? Where was the freight train with respect to those tracks?

A. Sitting on the far west track.

Q. How did you see the freight train?

A. I pulled up to the crossing there and my headlights shone [12] on the train.

Q. Had you seen it before your headlights lighted up the train?

A. No, but I had seen the bell signal.

Mr. Phelps: I object to that and ask that remark go out as not responsive.

Mr. Murman: I have no objection.

The Court: All right, the part that says, "I had seen the bell signal," that may go out.

Q. (By Mr. Murman): You say you pulled up to the North Street crossing and your headlights lighted up the freight train?

A. That is right.

Q. That was the first time you had seen the freight train? A. Yes.

Q. Did you see anything else at that crossing as you pulled up there?

Mr. Phelps: Objected to as incompetent, irrelevant, and immaterial, what else was seen at that crossing. It isn't the crossing where the accident occurred. Nothing to do with this.

The Witness: I seen the signal working there.

Mr. Murman: When you say "the signal," you mean something along the crossing there?

(Testimony of Tommy A. Hendrix.)

A. Yes, there is a bell signal there.

Q. How could you see it? [13]

A. There is a red light flashes off and on.

Q. After you saw that signal and saw the freight train, what did you do?

A. I turned around on North Street and north on Center Street and came back down to Ferry Street.

Q. That is the next street south of North Street, is that right? A. That is right.

Q. What did you do that for?

A. I was going straight across there, but it was also blocked so I went down——

Q. Just a moment. What was it blocked by?

A. By the freight train.

Q. Could you see it from Center Street?

A. Yes. There were some cars on the main highway along there, the lights of cars, you could see the lights from them underneath it.

Q. You mean the freight train was in front of the lights, is that it?

A. No, just as the cars went by you could see the reflection of the lights from the cars going by.

Q. On the other side of the freight train?

A. That is right.

Q. Then what did you do?

A. I went on down Center Street to the Howard Street crossing. [14]

Q. That is the next street south of Ferry Street, is that correct? A. That is right.

(Testimony of Tommy A. Hendrix.)

Q. What did you do at the Howard Street crossing?

A. I went across Howard Street crossing and then I stopped at the foot of the incline and looked to see if the signal was working, and it wasn't.

Mr. Phelps: I object to this, no foundation, incompetent, irrelevant and immaterial, not down to the time and place of the accident, has nothing to do with this accident. This matter comes before, not related to the particular issue, nothing to do with it.

Mr. Murman: You understand, Mr. Phelps, this was about 10 or 15 minutes before the accident occurred.

Mr. Phelps: You would develop it from your witness. That is one of the points of my objection.

The Court: Will you show about the time the accident occurred?

Mr. Murman: Yes, your Honor, not by this witness but another witness.

The Court: Show now when the accident occurred.

Mr. Murman: About a quarter to eight.

The Court: This is 7:30?

Mr. Murman: A little after 7:30. As I understand it the witness left his home at 7:30 and this was after he had [15] left home.

Q. Is that correct? A. That is right.

Q. About what time would you judge you got to the crossing?

A. I would say around 7:37.

(Testimony of Tommy A. Hendrix.)

Mr. Phelps: So we will understand my point in my objection I want to inquire, Mr. Murman I think stated that this was about 10 or 15 minutes before the accident?

Mr. Murman: Even closer to the time of the accident. The witness says it was 7:37 when he was there, and this accident happened at 7:45, approximately, which would be just eight minutes later.

Mr. Phelps: I think 7:47 is the time of the accident, but it is, at any rate, 10 minutes before this.

Mr. Murman: All right, not over 10 minutes.

Mr. Phelps: My objection still stands, if your Honor please, as being remote and having nothing to do with the accident, and I ask that all this testimony go out.

The Court: Overruled. Go ahead.

Q. (By Mr. Murman): You say you crossed the Howard Street crossing and noticed that the signal wasn't working?

Mr. Phelps: Objected to as leading and suggestive.

Mr. Murman: He had already testified to that.

Mr. Phelps. I am not making the objection not for the purpose of this question, but to continue that objection so [16] that you will frame your questions so they are not leading.

Mr. Murman: I will try to do that, Mr. Phelps.

Q. (By Mr. Murman): After you got across the crossing, what did you do, Mr. Hendrix?

A. I turned north on Highway 99, which is Center Street, east, and went towards Redding.

(Testimony of Tommy A. Hendrix.)

Q. At that time was it still dark? A. Yes.

Q. Was it still misty? A. Yes.

Q. Were you still using your windshield wiper?

A. That is right.

Q. What did you do, continue north toward Redding?
A. I went north on up to Redding.

Q. You have *many* that trip many, many times, have you?
A. That is right.

Q. Does the highway follow the railroad track?

A. It does, yes, all the way in to Redding.

Q. At that time after you left Anderson and went north to Redding, did you see a train at that time?

A. Yes, I met a passenger train about five miles south.

Q. Going which direction?

A. About five miles south of Redding, coming south.

Q. Towards Anderson? A. Yes. [17]

Q. You stated that as you went across Howard Street crossing the signal was not seen to be operating. Did you see any flagmen anywhere?

A. No.

Q. Mr. Hendrix, I show you four photographs and ask you to look at them and tell me if you can what they are pictures of.

A. This is a picture of Anderson, part of Anderson here.

Q. What part of Anderson?

(Testimony of Tommy A. Hendrix.)

A. Taken just this side—the south end of the depot.

Q. South end of the depot?

A. This is a picture——

Q. Before we get to the next picture, in which direction is the camera pointed?

A. Kind of towards the northwest.

Q. So this would be south and would be using the camera pointed towards the northwest?

A. That is right.

Mr. Murman: I will ask that this be marked for identification, if the court please, as plaintiff's exhibit next in order.

(Whereupon photograph of Anderson was marked Plaintiff's Exhibit No. 3 for identification.)

The Witness: This is a picture of West Center Street from the south.

Q. (By Mr. Murman): So that the camera points in the same [18] general direction, too?

A. Yes.

Q. But it is further from the depot, is that correct? A. That is right.

Mr. Murman: I will ask this be marked plaintiff's exhibit next in order.

(Photograph of Anderson referred to was thereupon marked Plaintiff's Exhibit No. 4 for identification.)

A. This is a picture of the depot and the Howard

(Testimony of Tommy A. Hendrix.)

Street crossing from the—it would be from the south—from the west to the north, kind of north-east.

Q. In other words, the camera was pointed to the northeast, but it is still south of the depot?

A. That is right.

Q. On which side of the railroad tracks was the camera placed?

A. It would be on the west side.

Mr. Murman: I will ask this be marked for identification plaintiff's exhibit next in order.

(Photograph referred to was thereupon marked Plaintiff's Exhibit No. 5 for identification.)

A. This picture is another picture of the south end of the depot pointing towards the south—the northwest.

Mr. Murman: I ask this be marked plaintiff's exhibit next in order, for identification.

(Photograph referred to was thereupon marked Plaintiff's Exhibit No. 6 for identification.)

Q. (By Mr. Murman): Referring to these four photographs you identified, can you state, Mr. Hendrix, whether or not those pictures show the conditions of that area about the time of the accident in daylight? A. Yes.

Q. Of course at the time you were there it was dark?

(Testimony of Tommy A. Hendrix.)

A. Yes, at the time I was there it was dark.

Mr. Murman: You may cross examine.

Cross Examination

By Mr. Phelps:

May I see those pictures, please?

Q. Mr. Hendrix, I am going to—looking at these photographs that you have identified, I notice that they are all taken at such an angle that you can't see directly down the tracks to show the view a person has down the tracks. May I ask you this, is it not a fact that the tracks there north of Anderson are perfectly straight? A. They are.

Q. Yes. And they continue on perfectly straight for as far as the eye can see?

A. That is right.

Q. And once a person has passed the line of the station indicated on this diagram, the driver of a car using that crossing can see all the way down the tracks? A. Yes. [20]

Q. There is nothing, no obstruction to his view. Now, then, these pictures—I will show you plaintiff's exhibit 3 for identification—can you tell us where that was taken from, or do you know? If you don't know, say so.

A. Approximately it is taken about here, just this side, to the west side of the stop sign.

Q. Yet the stop sign is not shown there.

A. That is right, but you can see the shadow of the telephone pole and the cross wire.

(Testimony of Tommy A. Hendrix.)

Q. Taken a little bit off the road, was it not?

A. No, that would be just about where the road stops.

Q. Now then, Mr. Hendrix, on this morning as you drove to work, you say it was about 11 miles to your place of work? A. That is right.

Q. As you got up first it was dark, of course?

A. That is right.

Q. You don't remember what time the sun rose that morning, do you? A. No, I don't.

Q. You are not purporting to testify, Mr. Hendrix, or represent to us what the conditions were as to visibility as of the time of this accident?

A. No.

Q. You were just telling us what you saw as of the time you went down? [21]

A. That is right.

Q. You left your home about 7:30?

A. Yes.

Q. And after leaving your home you didn't make any stops before coming to the railroad train up on North Street?

A. I stopped at Howard Street.

Q. Well, let me ask you this: Where is your home within the town of Anderson?

A. On Howard, West Howard—on East Howard.

Q. About how many blocks?

A. It is at the end of the fourth block.

Q. So that you were about four blocks away from Center Street? A. That is right.

Q. And you left your home at 7:30 and contin-

(Testimony of Tommy A. Hendrix.)

ued straight on down to Center Street, turned to your right on Center Street?

A. That is right.

Q. Then went down to the North Street?

A. That is right.

Q. Without any delay or any stops?

A. Well, if you have ever started a car in the morning on a cold morning up in that country, you know you usually let it run a few minutes.

Q. Well, I have started a car on a cold morning, but we are not concerned, Mr. Hendrix, with what the weather does. I am trying to find out your memory of this particular morning. [22]

A. Yes.

Q. That is the only thing that is in question here, this morning. Do you know what you did?

A. I let my car idle every morning before I take it out.

Q. Do you remember that? A. Yes.

Q. For about a minute?

A. Well, I usually give her a few minutes. I wouldn't say just how long.

Q. Now, after having let it run, at any rate you did—coming back to my question—you did continue on without stopping, at normal rate?

A. That is right.

Q. Not speeding, but not going slowly?

A. That is right.

Q. 20 or 30 miles an hour?

A. No, you don't drive 20 or 30 miles an hour in Anderson.

(Testimony of Tommy A. Hendrix.)

Q. Well, you were driving a reasonable rate?

A. That is right, a reasonable rate.

Q. I am trying to find out, Mr. Hendrix, what you were doing, what you did, how you did it. Now, you went on down this street and came down to Center Street. You didn't stop. The train was on the track and you turned and came back——

A. No, I didn't go back.

Q. You didn't stop? [23]

A. No, I didn't stop because I saw the train.

Q. You went down to Ferry Street, saw that the freight train was still blocking the crossing, then you came down to—what is the name of that street?

A. That is Howard Street, the Howard Street crossing.

Q. That is Howard Street? Then did you continue to cross Howard Street and on your way to work?

A. That is right.

Q. Now then, the train, the freight train that you saw was on the west track, is that right?

A. That is right.

Q. So that we may understand it, let's mark that track so that there will be no question about it.

Q. Do you want the witness to mark it, Mr. Phelps?

Mr. Phelps: Yes, if you will. Will you step to the board and mark that passing track or west track where the freight train was?

(The witness left the stand and went to the blackboard.)

Mr. Phelps: You have got a "W. T." and I will

(Testimony of Tommy A. Hendrix.)

put a circle around there and mark that "H-1," and I am pointing an arrow from W. T. to this train. That is the passenger train, is that correct?

A. Yes.

Q. That is the track the freight train was on?

A. Yes, that is right. [24]

Mr. Phelps: I have indicated that by "passing track." All right.

(Witness resumed the stand.)

Q. (By Mr. Phelps): As you went down there that morning that was the only train you saw there, is that right? A. That's right.

Q. You didn't see any other train at all that morning? A. Yes.

Q. Other than the passenger train you told us about five miles from Redding?

A. That is right.

Q. I understand that, but I am now referring to the time when you were going in and around Anderson, where you were making your circuit from home down to Center Street and North Street and back to Howard and across?

A. That is right.

Q. The only train you saw during that time was this freight train there on the siding on the west track? A. That is right.

Q. Now, did you make any observation as to how long that train was?

A. No, I wouldn't say, but the train was just about across the Ferry Street crossing.

(Testimony of Tommy A. Hendrix.)

Q. Just about across the Ferry Street crossing? Which way across, north or south? [25]

A. It would be on the south side, south end.

Q. That would be just about the south, towards Red Bluff?

A. It would be just about to where I put the "W.T."

Q. Let's mark that. Well, that is sufficiently clear, I think. Just where you have marked the "W.T."

A. Yes, there were two cars over the crossing there.

Q. Which way was the train headed, do you know?

A. The engine was headed north.

Q. So that the rear of the train was at the point "W.T."?

A. That is right.

Q. Caboose?

A. Caboose and a car.

Q. As you continued on you didn't have occasion to note anything in regard to the length of the train?

A. No, I never paid any attention.

Q. You were using your defroster?

A. Yes.

Q. It was cold and had a tendency to mist up on the inside, steam up?

A. That is right, steam up.

Q. And you found it necessary to use that?

A. Yes.

Q. And you did use it. You then didn't find it necessary to wipe your windshield with your hand?

A. That is right. [26]

(Testimony of Tommy A. Hendrix.)

Q. You had a mechanical device to do that?

A. Yes.

Q. I take it you were to work on time that morning?

A. Yes, sir.

Q. You have a clear recollection of this passenger train about five miles south of Redding?

A. Yes.

Q. Do you remember that?

A. Yes.

Q. This is not something you are reconstructing?

A. No, sir.

Q. You are sure you remember that?

A. Because I usually don't meet that train in the morning.

Q. I am just trying to find out whether you have an independent recollection of that.

A. That is right.

Q. All right, now, of course you didn't know anything about that accident until later, I take it, that night?

A. That is right.

Q. And when were you first approached by anyone and learned you were going to testify in this case?

A. I was approached by Mr. Wickfield. He came and asked me for my testimony.

Q. About how long after the accident?

A. I would say about two or three days after the accident. [27]

Q. All right, now, there is just one more thing, if I may. Now, Mr. Hendrix, of these three tracks we haven't identified this center track or the track

(Testimony of Tommy A. Hendrix.)

here for trains proceeding north and south, is that correct? A. That is the main line.

Q. The main line? That is the one where the trains come through on? A. Yes.

Q. The other one you have already said is a passing track, and what is this third track down here? A. That is another siding.

Q. When you went over the crossing—we have already covered this, but I want to make sure—you didn't see any other train other than the train you have told us about? A. That is right.

Q. Were there other cars on any of the other tracks? A. Not that I remember.

Q. I show you a photograph——

Mr. Phelps: I ask that it be marked as defendant's exhibit for identification next in order.

(Photograph was thereupon marked Defendant's Exhibit A for identification.)

Mr. Murman: Probably you should show it to the witness first to be sure it is a photograph in the case.

Mr. Phelps: I am sure it is, but I want it identified so [28] that I can and the record will be clear.

Q. (By Mr. Phelps): I show you a photograph which has been marked by the clerk defendant's exhibit A for identification and ask you if you can identify that and tell us what it is.

A. This is a picture of Anderson at the Howard

(Testimony of Tommy A. Hendrix.)

Street crossing, the Anderson depot, taken straight down the tracks at the south end of Anderson.

Q. And looking in the direction from which the locomotive—well, you don't know about the accident.

Mr. Murman: Looking north.

Mr. Phelps: Looking in the direction of Redding? A. That is right.

Mr. Murman: For the purpose of the record, that would be looking north, generally north, is that right, Mr. Phelps?

Mr. Phelps: Yes. I think we can agree on that, if you want to.

Mr. Murman: Yes. We have been using north and south.

Mr. Phelps: I think we should, because the compass is off and why don't we just say "north and south generally" here?

Mr. Murman: That is what I outlined in my opening statement, generally north to the right, south to the left, west to the top and east to the bottom.

Mr. Phelps: Railroad men always use "east and west." There is no "north and south." Everything from San [29] Francisco is east and everything toward San Francisco is west, so that when railroad men testify there may be—they may use that designation, but it isn't a geographical designation, but except for that anyone using those terms, we can agree on that, if the court please.

Q. (By Mr. Phelps): Now, this is looking di-

(Testimony of Tommy A. Hendrix.)

rectly down the track. That is directly down the track, the main line, is that right?

A. That is right.

Q. You can identify that as the main line?

A. Yes.

Q. Does this show substantially the conditions at the time of the accident, on the day of the accident?

Mr. Murman: In the daylight.

A. In the daylight, of course.

Mr. Phelps: Certainly. He wasn't there at the time of the accident. I asked him on the day of the accident. All right, we will offer that in evidence as defendant's exhibit next in order.

Mr. Murman: I have no objection to it going into evidence. I suppose you have no objection to those I presented.

Mr. Phelps: No.

Mr. Murman: Might as well put them all in evidence, then. [30]

The Court: Admitted.

(Plaintiff's Exhibit 3, 4 5 and 6, and Defendant's Exhibit A, formerly for identification, were admitted into evidence.)

Mr. Murman: Possibly at this time, if the court please, they should be displayed to the jury. So far I haven't shown them to the jury.

Mr. Phelps: I think that may be an excellent idea so they will have the locale right now at the outset.

The Court: Very well.

(Testimony of Tommy A. Hendrix.)

(Exhibits were handed to the jury.)

Mr. Phelps: Mr. Hendrix, while we have the pictures and the jury is looking at them I want to show you one more picture and ask you if you can identify that, and I will ask the clerk to mark it for identification before I hand it to you.

(Photograph referred to was marked Defendant's Exhibit B for identification.)

Mr. Phelps: I am going to show you defendant's exhibit B for identification——

May I approach the witness, your Honor?

The Court: Yes.

Q. (By Mr. Phelps): Mr. Hendrix, I want to show you that picture and call your attention that there is a train there on the siding and another train there. Now, without referring to [31] those because the location of those are not what I am concerned about, what does that show—can you tell us whether or not that picture, without reference to the trains, does that show the general view of the scene of the accident and a view down the tracks from the lead track?

A. I couldn't say because I never seen these.

Q. I understand that. [31A]

Q. I say, on the day of the accident and in daylight, does that picture show the view down the track taken at or near the lead track east of the main——

Mr. Murman: I will object to this, if the court

(Testimony of Tommy A. Hendrix.)

please, I think the photograph shows the physical situation which is not the same as the physical situation at the time of the accident. If Mr. Phelps wants to use it for purposes of illustration, if that illustrates generally the condition in that area on the day of the accident, I have no objection to that, but to say that is a photograph of the condition as it existed on the day of the accident is not a correct statement, as far as I can see.

Mr. Phelps: I think I was clear, your Honor.

The Court: The witness, I think, knows what you mean.

A. This picture, you could see if you pulled up on to the siding on the track.

Q. (By Mr. Phelps): And looked down?

A. On the side but not opposite the stop sign.

Q. I didn't ask you that.

Mr. Phelps: I will ask that last go out, if your Honor please, as not responsive, if your Honor please, volunteer statement.

Mr. Murman: It describes the picture, if the court please. Mr. Phelps was asking——

The Court: We will strike out "opposite." [32]

Mr. Phelps: I have no objection what he says as to any particular place.

Q. So that we are perfectly clear then, it does show the view north down the track from a point a little east of the first track you come to on Howard Street? Look at the picture again and tell me whether you think it does; if you don't think so——

(Testimony of Tommy A. Hendrix.)

A. The picture shows it when you are on the siding track there at Anderson.

Q. You don't think that shows it just a little east of the siding?

Mr. Murman: That is argumentative.

Mr. Phelps: I am asking it.

Mr. Murman: He told you what it shows according to his understanding of it. You are arguing with him, now.

The Witness: But it shows where the—where, you would see it all right if you were up on the siding.

Q. (By Mr. Phelps): All right, and the siding we are referring to is the east siding, not the west siding? A. That's right.

Q. I ask that this picture be introduced in evidence and shown to the jury.

Mr. Murman: I will object to it unless for the limited purpose of illustration.

Mr. Phelps: The picture is for the purpose [33] of illustration, if your Honor please, general purpose of illustration.

The Court: I will admit it.

The Clerk: Defendant's B in evidence.

(Whereupon photograph referred to was marked Defendant's Exhibit B in evidence.)

Mr. Phelps: And I might state so there is no question, if your Honor please, the picture I have just exhibited does show two trains. It is no rep-

(Testimony of Tommy A. Hendrix.)

resentation that that was the condition at the time of the accident.

The Court: I think that is generally understood.

Mr. Murman: Yes, I think so.

The Court: In other words, ladies and gentlemen, there are two trains in this picture but they are to be considered by you as if they weren't there.

Mr. Murman: You want to display that?

Mr. Phelps: Yes, if I may.

Mr. Phelps: I have no other questions of this witness.

Mr. Murman: Your Honor, do you have any objection to my asking two questions while the jury is looking at the picture?

Redirect Examination

By Mr. Murman:

Q. When you talk about plaintiff's exhibit No. 3, Mr. Hendrix, I believe you told Mr. Phelps, it was about where you would stop, as to what crossing would that be, [34] about where you stop?

Mr. Phelps: I object to that, as incompetent, irrelevant and immaterial, calling for this opinion and conclusion as to where he did stop doesn't make any difference.

Mr. Murman: My question as to what crossing——

Mr. Phelps: My objection is the form of the question, including about where one would; ask about what it shows.

(Testimony of Tommy A. Hendrix.)

The Court: Overrule the objection. He is only asking where you would stop. You understand the question?

The Witness: Yes. This is a picture that you would see if you stopped at the stop sign at Anderson and Howard Street crossing.

Q. (By Mr. Murman): That is the crossing you went over on that morning?

A. Yes, sir.

Q. By the way, you said you came out Howard Street and went north to—why didn't you go by way of Howard?

A. Because the North Street has a better crossing and has a better signal, and you have a better view.

Mr. Phelps: I will object to that as incompetent, irrelevant and immaterial, ask that the objection precede the answer and the answer go out, what this witness would have done.

The Court: Overruled.

Q. (By Mr. Murman): Now, when you saw the passenger train, [35] as you went north to Redding, was it still dark at that time? A. Yes.

Q. Was it still misty? A. Yes.

Mr. Murman: I have no further questions.

Recross-Examination

By Mr. Phelps:

Q. When you saw the passenger train, did it have its headlight on? A. Yes.

(Testimony of Tommy A. Hendrix.)

Q. And have one of those oscillating headlights on also? A. Not that I remember.

Q. You don't remember one way or the other; could have, could it?

A. It could have an oscillating light.

Q. As well as the regular headlight?

A. Yes.

Q. And they were burning?

A. The headlight was burning.

Mr. Phelps: No further questions.

Redirect Examination

By Mr. Murman:

Q. The only thing you recall seeing was a headlight? A. That is right.

Mr. Phelps: I object to that as leading, if your Honor please. [36]

The Court: It is already answered.

Mr. Murman: I have no further questions. May the witness be excused, your Honor?

Mr. Phelps: Certainly.

The Court: All right.

Mr. Murman: Thank you, Mr. Hendrix.

(Witness excused.)

Mr. Murman: Call Mr. Hewes, please.

RAYMOND ARNOLD HEWES

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Will you state your full name to the court and jury, please?

A. Raymond Arnold Hewes.

Direct Examination

By Mr. Murman:

Q. Mr. Hewes, you have come to court here pursuant to a subpoena issued by the plaintiff, have you? A. Yes.

Q. Where do you reside?

A. Redding, California.

Q. How long have you lived in Redding?

A. Off and on about 15 years.

Q. What is your business?

A. I'm a farmer.

Q. And have you always been a farmer? [37]

A. Well, most of my life; I have worked in lumber mills.

Q. That is up around the vicinity of Redding, is that correct? A. Yes.

Q. Now, did you know Mr. Shanahan before his death? A. No.

Q. Did you know Mrs. Shanahan before Mr. Shanahan's death?

A. I have just heard of them, that is all.

Q. You didn't know them personally?

A. No.

Q. You remember an accident occurred at Anderson about a year ago? A. Yes.

(Testimony of Raymond Arnold Hewes.)

Q. Do you remember the date?

A. It was December 27.

Q. That was the first working day after Christmas, was it? A. I believe it was.

Q. Now, on that day where did you live in relation to Anderson?

A. On that day I was living about 6 miles east of Redding.

Q. East of Redding?

A. East of Redding, yes.

Q. And was that out on the farm?

A. Yes.

Q. Did you have occasion to go into Anderson that morning? A. Yes, I was going to work.

Q. Where were you working on that occasion?

A. Down at Anderson, about 3 miles east of Anderson, the Arrowhead Lumber Company.

Q. About what time of the morning did you get up on the day we have been talking about?

A. I got up about 7:30.

Q. That was daylight saving time?

A. Yes.

Q. —or standard time?

A. Daylight saving time.

Q. Ordinarily be an hour—was it dark at the time you got up? A. Yes.

Q. What time after you got up did you leave home? A. Left home about 8:15.

Q. 8:15? A. To go to work, yes.

Q. You are sure it was after 8:00?

A. I usually leave about 8:15 to go to work.

(Testimony of Raymond Arnold Hewes.)

Q. Did you leave by yourself, or were you with somebody?

A. No, my brother-in-law was with me.

Q. What is his name? A. John DeRosa.

Q. Did you go in an automobile?

A. Yes, my automobile.

Q. And where did you go; did you go to Anderson? [39]

A. Went directly to Anderson to the job.

Q. Did you, in going to the Arrow Mill Company, I think you said—— A. Arrowhead.

Q. Arrowhead, did you have to cross the railroad tracks? A. Yes.

Q. And where did you intend to cross the railroad tracks?

A. Well, usually cross at the north crossing.

Q. In Anderson? A. In Anderson, yes.

Q. Did you go to the north crossing that morning?

A. Yes, it was right on our way, goes right straight out to the highway.

Q. Now, when you got to the north crossing, tell us what, if anything, you saw there?

A. Well, when I reached the north crossing, why, there was a light shining on the track, and seen a freight train cross the track.

Q. Was it dark at that time? A. Yes.

Q. And how was the weather?

A. It was—well, I guess it was misty, or fog.

Q. Did you use your windshield wiper?

A. Yes, all the way down.

(Testimony of Raymond Arnold Hewes.)

Q. Had your lights on on the car? [40]

A. Yes.

Q. You saw the freight train with your lights, is that right? A. Yes.

Q. Then what did you do?

A. Well, couldn't get across. I went down on to Center Street, the next crossing seen it was blocked.

Q. The next crossing. *What* would be the next crossing, south of the north crossing? A. Yes.

Q. What did you see?

A. It was blocked, the cars—and there was a boxcar on the crossing and so I had to go on down.

Q. Could you see the boxcar yourself?

A. Yes.

Q. How was it lighted; you said it was dark, didn't you?

A. Yes. The lights from this side of the street.

Q. You mean on the east side?

A. East side of the street and lights you could see—you could see the outline.

Q. You could see the outline of it?

A. Yes, sir.

Q. Then what did you do?

A. Well, we went on down to the Howard Street crossing.

Q. Now, before you got to the Howard Street crossing, did anything happen in connection with your driving? [41]

A. Only thing, a car pulled out in front of us.

Q. A car pulled out in front of you?

(Testimony of Raymond Arnold Hewes.)

A. Yes.

Q. Where did the car come from?

A. Out of Howard Street crossing.

Q. What kind of a car was it?

A. It was coupe.

Q. When you say "coupe," you mean a two-door type body? A. Two-door sedan, yes.

Q. Will you come down here?

(Witness went to blackboard.)

Q. Will you mark on the map—by the way, you understand this map? This is generally north to the right, generally south to the left, west to the top and east to the bottom and has been marked already, North and Howard, the depot, and this that I am pointing to now, the three parallel lines, six parallel lines, represents the railroad tracks. Do you understand that? A. Yes.

Q. Now, will you mark about where you first noticed this coupe you mentioned?

A. Well, I believe it was right about in here (indicating).

Q. Put a mark there, will you? The witness has placed an X—I will darken it a bit, and with your permission I will draw a line to the margin and mark it—what shall we use up here—[42] guess we will have to use this letter, a different letter—

Mr. Phelps: What is your first name?

The Witness: Raymond.

Mr. Phelps: Make it R.H.

Mr. Murman: R.H.—1.

(Testimony of Raymond Arnold Hewes.)

Q. Now, Mr. Hewes, where was your car when you saw this coupe at R.H.—1?

A. I believe right about in here (indicating).

Q. Will you mark that, please? The second X, if the court please, we will call R.H.—2.

Now, what happened, Mr. Hewes, after you saw this coupe in front of your car? I understood you to say you were going south? A. That's right.

Q. Was the coupe going south also?

A. Yes, sir.

Q. What happened after you saw the coupe in front?

A. Well, I pulled up behind him and he started to go up to the tracks, to the crossing there.

Q. Have any idea about what speed he was going?

A. No, he wasn't going fast, he was almost to the crossing.

Q. I see. Speak up loud enough so the reporter can hear you.

You say you pulled up behind him and went up to the crossing? A. That's right. [43]

Q. Did he stop at the crossing? A. Yes.

Q. Will you mark about where you remember him stopping, having in mind that these two parallel lines are supposed to represent the outlines of the crossing. A. Right about in here, about.

Q. All right, right about there (indicating). You placed another "X" at the point where the black line intersects the parallel lines of the crossing, is that right? We will mark that R.H.—3.

(Testimony of Raymond Arnold Hewes.)

Now, where did your car go—where did you stop your car, did you stop your car?

A. Yes, right behind his car.

Q. Put a mark where you stopped your car.

A. Right about here (indicating).

Q. That is R.H.=4. You stopped a little bit north of the track, is that correct? A. Yes.

Q. But you headed toward the rear of his car?

A. That's right, right behind him.

Q. Now, did you observe the driver of the coupe doing anything at that point?

A. Well, at that time when we stopped, as I pulled up and stopped, I started wiping my windshield and could see he was doing the same. [44]

Q. Through his back mirror?

A. Through the back window, that's right.

Q. It was cold that morning?

A. The windows was fogged up.

Q. You wiped off your windshield, and you looked through his rear window and saw him wiping his? A. Yes.

Q. What happened then? Before I ask you that, about how long were you, were you and he stopped at that point, do you know?

A. I don't remember exactly how long.

Q. What is your best recollection and best judgment?

A. Maybe a minute, minute and a half, something like that.

Q. Then what happened?

A. We just were going up on the track.

(Testimony of Raymond Arnold Hewes.)

Q. He started going across the track?

A. Started crossing the crossing, yes.

Q. Did he go across rapidly?

A. No, just moved along slow.

Q. And what did you do?

A. I just pulled up just about where he stopped.

Q. In other words, you moved your positions from R.H.=4 to R.H.=3? A. Just about.

Q. At that time, and did you have occasion to look across the crossing to the other side of the street? [45]

A. I wasn't very interested. I pulled up to this stop sign and stopped.

Q. There is a stop sign there, is there?

A. Yes.

Q. Place about where you recall the stop sign.

A. It would be—I don't remember exactly where.

Q. Your best recollection.

A. I would say right in here, somewhere; I think it is about right here (indicating).

Q. We will call that R.H.=5; that was the stop sign? A. Yes.

Q. You pulled up and stopped where he had been, is that right? A. Yes.

Q. He was in turn going across the crossing?

A. Yes.

Q. Now, at that time, had you heard any whistles blowing, or any noise of any kind?

A. No, not that I recall, I never heard——

Q. Did you hear any bells? A. No.

Q. Heard nothing?

(Testimony of Raymond Arnold Hewes.)

A. I didn't hear a thing.

Q. Did you see anything on the other side of the crossing at all? A. No, not at all. [46]

Q. See any lights on the other side?

A. Only lights was across the street, you could see.

Q. Across the street, across Center Street?

A. Center Street.

Q. Where, will you give us just generally, pointing without marking?

A. Right about in here, right where the High Tower station was.

Q. The High Tower station; is that a service station? A. A service station.

Q. A service station in this general area across on the other side of the crossing? A. Yes.

Q. Those the only lights that you could see?

A. Only lights I noticed when I pulled up there.

Q. Now, had you gone across the Howard Street crossing before?

A. Well, I went across there several times.

Q. You know anything about whether there were any crossing signals there?

A. There was one there.

Q. One there. Can you mark about where that crossing signal was? We are speaking now of the time, of course, of the accident.

A. I don't know exactly where it is in here.

Q. About.

A. It is pretty close in here. [47]

Q. All right, about in there. You marked an-

(Testimony of Raymond Arnold Hewes.)

other X, and we will call that R.H.=6. Have you ever seen that signal in the daylight? A. Yes.

Q. What kind of a signal is it?

A. It is a wig-wag signal.

Q. A wig-wag signal. Did you ever see it in operation? A. Yes, I have seen it.

Q. What does it do when it operates?

A. It goes back and forth, and the red light is supposed to shine.

Q. Is the red light supposed to shine?

A. And a bell rings.

Q. This morning, as you stopped here at R.H.=3, you didn't see any red light——

Mr. Phelps: I object to that as leading and suggestive.

Mr. Murman: Already testified he saw nothing but the lights.

The Court: It was leading, you had better re-frame the question.

Q. (By Mr. Murman): As you stopped here at R.H.=3, what, if anything, did you see in the general direction of R.H.=6 where you placed that?

A. Never seen anything except the lights across the street.

Q. Never saw anything except the lights across the street? [48] A. No, sir.

Q. But you were looking in that direction?

A. Yes, had to to cross.

Q. Now, as you stopped here at R.H.=3, did you see—did you watch the coupe go across the tracks? A. Yes.

(Testimony of Raymond Arnold Hewes.)

Q. What happened?

A. Well, he got about midway of the main track, that is where the train hit the back and was right about the middle of the track, that is here.

Q. Back end of what? A. Of the coupe.

Q. Was it the middle of the main tracks?

A. Yes.

Q. That was where it hit him, is that what you said? A. That's right.

Q. Where did you first see the train as you were stopped here at R.H.—

A. Sitting right about where Shanahan was. All I seen was just the lights.

Q. All you saw was the lights?

A. That is all I seen.

Q. Did you see the lights at any time before you got to this point where you stopped?

A. No. [49]

Q. That is R.R.—3? A. No.

Q. Never saw a light before that point?

A. No.

Q. Did you hear a whistle at any time?

A. No, I didn't.

Q. Now, when you saw the light, did you look at the direction of the light?

A. Yes, just glanced, that is all I had time for.

Q. About how much time elapsed between the time you saw the light and the time that the collision occurred?

A. About a second or two; I don't know how long it was.

(Testimony of Raymond Arnold Hewes.)

Q. Just—you said a second or two?

A. About that, I guess, as I can recollect.

Q. A short interval of time? A. Yes.

Q. What happened after the train hit the coupe?

A. After it hit the coupe and passed through, we pulled across the crossing.

Q. The train completely cleared the crossing?

A. Yes, sir.

Q. Did you see what happened to the coupe after it hit it?

A. I seen it hit it and that was all.

Q. Did you notice the speed of the train as it went across the crossing? [50]

A. Well, I would say it was going about 60—65, somewhere.

Q. You have driven an automobile for a long time, have you? A. Yes.

Q. Based on your experience as a driver, you judge the train was going 60 to 65?

A. Yes, about that.

Q. All right, you go back and sit down.

Now, when the train hit the coupe——

The Court: I think we will take a recess. Ladies and gentlemen of the jury, bear in mind the admonition I have heretofore given you.

(Short recess.)

Q. (By Mr. Murman): Mr. Hewes, as you saw the coupe go across the crossing in front of you, what, if anything, did you notice about the rear of the automobile?

(Testimony of Raymond Arnold Hewes.)

A. The only thing, the tail lights were burning.

Q. You say the tail light was burning?

A. Yes.

Q. Now, at the time the collision occurred, did you still have your headlights on? A. Yes.

Q. And you still had your windshied wiper going? A. That's right.

Q. And after the collision occurred, did you continue on across the crossing from the division R.H.—3 where you were [51] stopped?

A. Yes.

Q. And where did you stop the car?

A. Stopped just on the other side of the crossing.

Q. Did you get out of the car?

A. Yes, we both got out.

Q. Where did you go?

A. Went over to see what we could do, see if he was alive or not.

Q. Did you know it was Mr. Shanahan?

A. Not at the time.

Q. Did you later learn it was his name?

A. Through papers we picked up.

Q. Did you go down and see the body?

A. Yes.

Q. And have you any idea about how far from the crossing the body was when you saw it?

A. I believe about 120 feet.

Q. 120 feet—keep your voice up a little—and on which side of the main track was it, to the west or the east? A. The west side.

Q. And where was the coupe?

(Testimony of Raymond Arnold Hewes.)

A. It was on the west side, too, about 20-30 feet from the body.

Q. 20 to 30 feet from the body? [52]

A. That's right.

Q. Did you go over and look at it?

A. Yes.

Q. I believe you said Mr. DeRosa was with you in the automobile? A. Yes.

Q. Did he go with you to look at the body and the automobile? A. Yes.

Q. I show you what purports to be a photograph of the damaged automobile, and ask you to tell me whether or not you have seen that automobile, if that is a picture of it, before?

A. I believe it is; it looks just about the same.

Q. About the same as what?

A. Same as it was when I first seen it.

Q. Same as what was? A. The coupe.

Q. The coupe? A. Yes.

Q. All right. When you first saw it at 140 or 150 feet, 20 or 30 feet beyond the body, it was in that condition, was it? A. That's right.

Mr. Murman: At this time, if the court please, we will ask that the picture be admitted as Plaintiff's exhibit next in order, in evidence.

Mr. Phelps: No objection.

The Clerk: Plaintiff's exhibit 7 in evidence. [53]

(Whereupon photograph of car, referred to above, was admitted in evidence and marked Plaintiff's Exhibit No. 7.)

(Testimony of Raymond Arnold Hewes.)

Q. Now, do you have any recollection, Mr. Hewes, at about what time the actual collision occurred?

A. Either around 7:40, 7:45.

Q. 7:40 or 7:45. After you saw the automobile, did you continue on to your work?

A. Yes, we went back to the car and continued to work.

Mr. Murman: At this time, may I display plaintiff's exhibit 7 to the jury?

(Handing exhibit 7 to the jury.)

Q. Now, Mr. Hewes, there is already in evidence plaintiff's exhibit 3. Can you tell me what that is a picture of?

A. It is a picture about where the car was, over here (indicating).

Q. What car? A. Shanahan's car.

Q. At what time?

A. I don't know. This looks like it was taken in the daytime.

Q. But you said a picture about where the Shanahan car was? A. Yes.

Q. At what time—you made several marks on the map.

A. About the time I pulled behind him, which was about 7:30, something like that.

Q. You mean when you pulled up behind him at the crossing? [54] A. Yes.

Q. You say that is a picture showing about where he was, is that correct?

(Testimony of Raymond Arnold Hewes.)

A. About where he was, or a little farther south.

Mr. Phelps: May I see it?

Mr. Murman: That is plaintiff's exhibit 3.

Mr. Phelps: I didn't know which one it was. The objection I have, if your Honor please, I thought the question was as to where it was on the picture, but as to whether or not it was the view from where he was I would object as calling for a conclusion, as to the view the driver had at any particular point, that does call—I think that would be a conclusion.

Mr. Murman: Let me ask another question, Mr. Hewes,—

Mr. Phelps: I ask that go out then.

The Court: Will you read the last answer?

(Last answer read by the reporter.)

The Witness: That would be north.

The Court: Well, I will let the answer go out. Reframe the question.

Q. (By Mr. Murman): Mr. Hewes, was it your testimony that you stopped at the point you marked as R.H.-3 when you first saw the Shanahan car stop?

A. Yes. No, where I first seen him stop, when I stopped right behind him, and then—— [55]

Q. Didn't you say you pulled up to where he had been stopped? A. Yes.

Q. And you stopped there yourself?

A. That's right.

Q. Now, calling to your attention to that photograph, what is that a picture of?

(Testimony of Raymond Arnold Hewes.)

A. Be just about what you could see from this point.

Q. Where you had stopped yourself?

A. Yes.

Q. After Mr. Shanahan pulled forward and you had pulled up to where he was, is that right?

A. That's right.

Q. Now, in plaintiff's exhibit 5, there is shown on the left-hand side of the photograph what looks like a wig-wag signal. Is that the wig-wag signal to which you have been referring?

A. Yes, it is.

Q. That is the same signal that you marked up here at R.H.-6, is that correct? A. Yes.

Q. Mr. Hewes, did you see any flagman at that crossing at the time that you stopped at R.H.-3, or at any other place? A. No.

Mr. Phelps: I will object, incompetent, irrelevant and immaterial; outside the issues of the case.

The Court: Because of what? [56]

Mr. Phelps: Outside the issues of the case, no claim there should be any flagman here that I have heard yet.

The Court: I will overrule it. It must be apparent to you.

Q. (By Mr. Murman): Did you answer the question?

A. I did; I said no, there was no flagman there.

Mr. Murman: You may cross-examine.

(Testimony of Raymond Arnold Hewes.)

Cross-Examination

By Mr. Phelps:

Q. Now, Mr. Hewes, as a matter of fact the day was just about breaking, was it not, at the time of the accident; daybreak?

A. Well, it would be, yes.

Q. So it was not dark in the sense——

A. It was still dark—it wasn't plumb dark, no.

Q. Dawn had started to break some little time before that?

A. I don't know about the dawn, it was misty, so it was still fairly dark.

Q. Well, you are talking about two different things. I am trying to find out what the condition was with respect to daylight, night, twilight or dawn.

A. Well, I guess it would be dawn.

Q. It would be dawn? A. Yes.

Q. In other words, it wasn't the black of night?

A. No. [57]

Q. All right. And you have that intermediate stage between the darkness and when the sun rises; it was some time in there?

A. Yes.

Q. Now, some time during that 25 or so minutes of dawn, is that right?

A. That is right, about right.

Q. And do you know approximately or do you know when the sun rose that day?

A. No, I don't know exactly.

Q. All right. So that you could then see objects without the aid of your headlights?

(Testimony of Raymond Arnold Hewes.)

A. Well, you could see it, yes, if fairly close.

Q. You could see the station without your headlights?
A. Yes, drove right by it.

Q. And you could see the freight cars on the other crossing without your headlights, couldn't you?
A. Yes.

Q. Didn't need your headlights for that, you could see the stop sign without your headlights?

A. No—well, yes.

Q. The arterial stop sign?

A. Stopped right by it.

Q. And you could see other objects in and around there without your headlights?
A. Yes. [58]

Q. Did you say it was misty; was that a low-hanging mist, or a high mist?

A. That I wouldn't know. It was just misty.

Q. Just a little misty?
A. Yes.

Mr. Murman: Not a little misty, he said misty.

Mr. Phelps: I am cross-examining, if he wants to correct me he can, rather than you, Mr. Murman. If he wants to say not a little misty, then it should come from him, not from you.

Q. Now, Mr. Hewes, talking about this mist, as a matter of fact it was a little overcast, wasn't it?

A. I guess you would call it overcast.

Q. It had rained the night before?

A. I don't recall whether it rained or not.

Q. Rained rather heavy the night before, didn't it?
A. I don't know.

Q. Were the streets a little bit wet from rain?

(Testimony of Raymond Arnold Hewes.)

A. I don't know whether it was from rain or mist?

Q. So as a matter of fact, you don't know then whether this mist was of sufficient quantity to cause dampness to the streets, do you?

A. It could have.

Q. It could have or could not have; you don't know?

A. It was thick enough, it could have; it was coming down pretty heavy. [59]

Q. On the other hand, it could have been from the rain? A. Could have, if it rained.

Q. Now, as you were driving along, you say you used your windshield wiper, is that right?

A. That is right.

Q. Did you use it all the time, or just off and on?

A. All the way down to the job.

Q. All the way down to the job?

A. That is right.

Q. Even after this accident?

A. That is right.

Q. Could you see the High Tower service station across the way? A. Yes.

Q. Could you see the other buildings across on 99?

A. I could see the outlines of them.

Q. Yes, you could see the outlines of the other buildings across the highway over here in this area on the map?

A. Well, no, not over here; you could see over

(Testimony of Raymond Arnold Hewes.)

here when we stopped. Over to your left, right straight across.

Q. Could you see the outlines of the buildings without reference to the light on them?

A. Yes.

Q. Whatever visibility there was, it was that good?

A. Yes, it was that good, because that High Tower light is [60] bright on that side, all white lights.

Q. But you could see the outline of the buildings, I am getting at, not just the light? A. Yes.

Q. And when you looked, I take it that you looked—well, withdraw that a moment. When you came down from wherever you were coming from, which street did you approach Center Street. Did you come down, go south on Center?

A. That is right.

Q. You don't live in the town of Anderson?

A. No, sir, I live up toward Redding, about six miles out.

Q. As you were coming south on Center Street, then, you saw this car, this coupe, coming out of Howard Street? A. That is right.

Q. It was coming—it had come out of, or was going west on Howard Street?

A. Yes. Going west?

Q. Yes. A. Yes, it would be going west.

Q. Coming out of Howard Street, made a left-hand turn into Center Street, is that right?

A. That is right.

(Testimony of Raymond Arnold Hewes.)

Q. And turned left, to your left and on Center it had to turn again to your right at the jog of the crossing over the track?

A. That is right. [61]

Q. Will you step to the board, please? We have simply a cross. Will you indicate to us the position of the car as you saw it, relative position of the car, by drawing a rectangle. I have this in mind—in other words, I have drawn something like that (indicating) rather than just a cross, will you please? This was the position of the car when you first saw it in the street?

A. This is the car right here (indicating).

Q. Have you drawn a red rectangle over your cross there at "R.H.-1." Was that lengthwise of that? Which way would that be headed?

A. This way, this direction.

Q. You indicate which way?

A. Going this way. The front would have to be this way.

Q. You have drawn a line out. I will put an arrow on it. Is that all right? Does that indicate the direction of it? A. Yes.

Q. Will you also draw a rectangle to indicate the position of the car, the relative position and head in the street at the time you saw it come to a stop and that you came to a stop?

A. Like this (indicating).

Q. Which way was it headed? A. Across.

Mr. Murman: May the record show that is R.H.-3?

Mr. Phelps: I was just about to do that, Mr.

(Testimony of Raymond Arnold Hewes.)

Murman. [62] At R.H.-3 he has drawn another rectangle to indicate the car, the position of the car as it was stopped.

Q. Where were you at that time?

A. That is where I first seen the car. I was right about there (indicating).

Q. Headed south? A. Yes.

Mr. Murman: That is R.H.-1, isn't it?

A. Yes.

Mr. Phelps: Yes.

Q. At the point, where did you come to a stop behind him?

Mr. Murman: Pardon me, it is R.H.-2. I had the wrong numeral.

Q. (By Mr. Phelps): Will you describe that rectangle so that I can see in which direction your car was headed? A. This direction.

Q. Will you draw an arrow from that line to indicate the direction in which the car was headed? That is a rectangle drawn over R.H.-4. That indicates the position of the car when you stopped?

A. The front of it.

Q. Headed diagonally towards the Howard Street crossing? A. I was right behind him.

Mr. Murman: Do you want him to draw a good rectangle?

Mr. Phelps: I think we can understand from the arrow [63] which way it is going. Will you resume the stand?

(The witness resumed the witness stand.)

(Testimony of Raymond Arnold Hewes.)

Q. (By Mr. Phelps): Now, then your windshield was steaming up, is that right?

A. That is right.

Q. That was from the weather? On the inside, I am talking about now.

A. It was warm inside, that is the reason it was steamed up.

Q. Your breath, and so forth, got on the windshield? A. That is right.

Q. That hasn't got anything to do with rain or mist on the outside? That was inside?

A. It was the dampness and coldness on the outside that caused it.

Q. What kind of car were you driving?

A. I was driving a 1941 Pontiac.

Q. What? A. 1941 Pontiac.

Q. Did you have a defroster?

A. Yes, I did.

Q. Did you use it?

A. But it wasn't working.

Q. As you came to a stop behind him, about, approximately how far behind his car were you when he came to a stop and you came to a stop behind him? [64]

A. Front was about five feet from his car, I guess.

Q. As you came to a stop, you observed him wipe off his windshield, is that right?

A. That is right.

Q. On the inside? He didn't get out?

(Testimony of Raymond Arnold Hewes.)

A. On the inside. No, he didn't get out.

Q. Just with his hand, is that right?

A. That is right.

Q. Didn't use a handkerchief or anything, just wiped it off?

A. No, just his hand going back and forth.

Q. Directly in front of him?

A. That is right.

Q. That is all you saw him doing?

A. That is all I saw him doing.

Q. You didn't see him do anything else, then, than what you have just told me?

A. Not that I recall.

Q. When you saw him do that, then in order to see it you had wiped yours off, too, is that right?

A. No, I wiped mine off first. I could see him wiping his off.

Q. Not afterwards? All right. So then you did wipe your windshield, and he continued on forward, started on, and after he started up did he again come to a stop at any time up until the collision? [65]

A. No.

Q. You have shaken your head. The reporter can't get that.

A. No stop at all.

Q. Did he after starting up, did he ever appear to slow down at any time?

A. No, just seemed to keep the same speed and went on across the track.

Q. Did he appear to accelerate?

A. Speed up?

(Testimony of Raymond Arnold Hewes.)

Q. Yes. A. No.

Q. At any time? A. No.

Q. After having started up?

A. No, just went on up across the tracks, just about the same speed.

Q. The same speed? He had reached a speed which was constant with him?

A. Yes. He was going slow across the tracks.

Q. My question is, had he accelerated up or still going faster or had he reached a speed which was constant with him?

A. No, just kept the same speed he started out with.

Q. About how long after he started out did he reach that speed which was constant with him up to the point of the accident, and how far did he go before he reached that speed? [66]

A. I don't know. Well, he just—he was going slow all the time, so I wouldn't know how fast he was going. I wouldn't know.

Q. Do you have any knowledge, any estimate of his speed? A. No.

Q. You don't know, is that it?

A. I just pulled up where he was and stopped and then started going across it.

Q. Now then, were the windows in your car closed? They were, weren't they?

A. That is right.

Q. Where you, you say, couldn't hear the whistle?

A. That is right, I didn't hear the whistle.

(Testimony of Raymond Arnold Hewes.)

Q. You don't mean to say there wasn't a whistle, a whistle sounded, do you?

A. No, I don't mean there wasn't. I never heard it.

Q. That is all you can say? A. That is all.

Q. Whereas you say you didn't hear a bell, again you don't mean to testify that a bell was not sounded? A. That is right.

Q. It could have been sounded?

A. It could have. I didn't hear it at all.

Q. Once again, whereas you say you didn't see a wig-wag signal working, you don't mean to testify that it wasn't [67] working, but again you only did not see it?

A. It wasn't working, so far as I know, because if it was working I would have seen it.

Q. Will you answer my question?

Mr. Murman: That is an answer.

Mr. Phelps: May I go on, if your Honor please? I am not making any motion to strike.

The Court: Proceed.

Q. (By Mr. Phelps): Mr. Hewes, you have testified so far you didn't see it working, isn't that true? A. That is right.

Q. That is all you know about it?

A. That is right. It wasn't, so far as I know, it wasn't working. If it had been working I could have seen it from the position I was.

Mr. Phelps: I will ask that go out, as not respon-

Mr. Murman: I think it is responsive.
sive, if your Honor please.

(Testimony of Raymond Arnold Hewes.)

Mr. Phelps: It isn't responsive to my question, which is very pointed and he knows perfectly well it is pointed and he is not answering the question.

Mr. Murman: Mr. Phelps is asking this witness to speculate.

Mr. Phelps: I am asking him what he saw, that is all I am asking him. [68]

The Court: I think he answered it. He said he didn't see it.

Mr. Phelps: That is what I am getting at.

Q. (By Mr. Phelps): That is all you know of it, you didn't see it?

A. I didn't see it working.

Q. So far as your frame of mind was concerned then from that, you don't know whether it was working or not, isn't that true?

Mr. Murman: That is argumentative.

A. It wasn't working, so far as I know.

The Court: I think I will let the answer stand.

Mr. Murman: I didn't hear the answer. I am sorry.

The Court: The answer was, it wasn't working so far as he knows.

Mr. Murman: Yes, your Honor, I am sorry.

Q. (By Mr. Phelps): Is that the best answer you can give to my question, that you don't know whether it was working or not?

A. As far as I am concerned, it was not working. If it was, I would have seen it going back and forth.

Q. All right. Now then, as a matter of fact—

(Testimony of Raymond Arnold Hewes.)

withdraw that a moment. Let's go to another subject here. So far as the light or any wig-wag signal, covering that specifically, you say you didn't see a light or wig-wag signal, is that right?

A. That is right.

Q. I will ask you the same question so that it will be [69] perfectly clear. As a matter of fact, that is all you know, you didn't see it, you don't know whether it was working or not, isn't that right?

A. If it was working it should have had the red light on it, shouldn't it?

Q. Answer the question. So far as you know, you don't know whether the light was on or whether it was working.

A. It was not working.

Q. You didn't see it, isn't that the extent of your knowledge?

A. That is right, I didn't see it on there.

Q. Do you remember when—is your memory any better now about this accident than it was on the day after the accident?

A. I don't know whether it would be or not, I guess.

Q. You have talked to Mr. Murman, have you not, since coming down here?

A. That is right.

Q. And you have talked to the investigator for the United States Government, Mr. Wickfield, who is sitting here, correct?

A. That is right.

Q. And he told you he was an investigator for

(Testimony of Raymond Arnold Hewes.)

the Government for their interests in the case?

A. I guess that is right, yes.

Q. And you talked to him?

A. That is right.

Q. When did you first talk to him? [70]

A. That I wouldn't know.

Q. Several days after the accident, wasn't it?

A. Some days, I guess.

Q. Three or four days after the accident?

A. I don't know exactly.

Q. At any rate it was some time after December 28, the day after the accident, wasn't it?

A. December 27, wasn't it?

Q. The accident happened on the 27th.

A. 27th, yes.

Q. I say you talked to Mr.—what's his name?
Mr. Murman: Wickfield.

Q. (By Mr. Phelps): Wickfield, several days after the accident, not just the day after?

A. Not that I recall. I don't remember.

Q. Do you remember when your statement was taken and you were asked questions by a representative—

Mr. Murman: May I see it?

Mr. Phelps: Yes, certainly, but I am asking him some preliminary questions first. You can look at it if you wish while I am asking these preliminary questions.

Q. (By Mr. Phelps): Do you remember when your statement was taken by a representative of the Southern Pacific on the day after the accident?

(Testimony of Raymond Arnold Hewes.)

A. I can't recall. I know there was a statement taken. [71]

Q. When that statement was taken you were trying, I take it, to truthfully and accurately set forth that which you knew about the case at that time?

A. That is right.

Q. He asked you questions and he wrote down in narrative form what you told him about it, didn't he?

A. That is right.

Q. After he got all through, you read it and then signed it, didn't you?

A. That is right.

Q. And you did read that statement?

A. I did.

Q. And did you think those things that were in this statement were true and correct as to your knowledge at that time, isn't that right?

A. What was that again?

Q. I said, the things you got in that statement, after reading it, were true and correct?

A. That is right.

Q. He stated them as you had said it?

A. That is right.

Q. All right, I will show you then a paper of three pages and ask you to read that and see if you can identify that as the statement which was taken the day after the accident. First, if I may——

Mr. Murman: Let him read it, Mr. Phelps. He is trying to read it.

Mr. Phelps: I am sorry. I was going to ask him first to identify his signature for the record.

Q. (By Mr. Phelps): Will you first look at the

(Testimony of Raymond Arnold Hewes.)

signatures there and tell us whether or not those are your signatures? A. Yes, those are mine.

Q. All right. You are handing me back a document which I have shown you, and I asked that it be marked for identification, and I want to ask you some questions about it.

(Statement of Mr. Hewes was thereupon marked Defendant's Exhibit C for identification.)

Q. (By Mr. Phelps): Now, Mr. Hewes, the first three places here, the name appears, "Raymond H. Hewes." Are those your signatures on all three pages? A. That is right

Q. And the last page, your signature appears before this statement: "I, Raymond H. Hewes, have read and understand the foregoing statement of three pages and it is true and correct to the best of my knowledge and belief."

A. That is right.

Q. That was there and you knew that?

A. Yes.

Q. And this statement is true and correct, to the best of your knowledge, is it not? [74]

A. That is right.

Q. I call your attention, then——

Mr. Phelps: At this time, if the Court please, I should like to read into evidence this statement, which we now offer in evidence.

Mr. Murman: I am going to object to the reading of the entire statement because I understand

(Testimony of Raymond Arnold Hewes.)

the witness is only being questioned at the moment as to the wig-wag signal.

Mr. Phelps: Questioned about everything. He said it was true and correct.

Mr. Murman: I don't think that is competent evidence except to the one point we are talking about.

The Court: I think if it is being used for impeachment, only that part which impeaches should be read if they object to the rest of it.

Mr. Phelps: Does the Court rule I can only question him with reference to that portion referring to the wig-wag?

The Court: Yes, at the present time.

Mr. Phelps: My offer at this time is general and I offer the entire document.

The Court: I will look it over during recess. In the meantime if you wish a particular thing, to read from it——

Mr. Phelps: I do, your Honor. All right, I call your attention—I show you first, counsel——

Mr. Murman: I have read it. [75]

Q. (By Mr. Phelps): I show you—I call your attention to these—read this, first (handing exhibit to the witness). A. Yes.

Mr. Phelps: Counsel, I want to show you the part I want to read (showing document to counsel).

Mr. Phelps: I will read this to you and ask you if you made this statement and if it isn't true and correct and this was what you said at that time: "I cannot state whether or not the wig-wag signal at the crossing was operating at the time of the

(Testimony of Raymond Arnold Hewes.)

accident or not, although I did not see any type of light burning or any signal at the crossing and did not observe any signal at the crossing. I also did not hear any signal bells ring, but this may also be due to the fact that the windows were closed on my car."

Mr. Murman: I submit that is not impeaching, if your Honor please. That is consistent with the witness' testimony.

Mr. Phelps: Well——

The Court: Just a minute. I will allow the matter that has been read to stand in the record.

Q. (By Mr. Phelps): Did you make that statement? A. That is right.

Q. That is still true and correct, isn't it?

A. That is right.

Q. So that you don't know whether the wig-wag signal was working or not? [76]

A. That is right. It wasn't working or else the red light would have been there, isn't that right?

Q. Well, Mr. Hewes, this is a true and correct statement that you can't state whether it was working, isn't that right?

A. If I stated it there, why, I guess that is what it was at that time, yes.

The Court: We will take a recess now until two o'clock. Ladies and gentlemen of the jury, during recess will you bear in mind the admonition I have heretofore given you?

(Thereupon an adjournment was taken until 2:00 o'clock p.m., this date.) [77]

December 21, 1949, at 2:00 o'Clock

RAYMOND ARNOLD HEWES

resumed the stand.

Cross-Examination

(Continued)

By Mr. Phelps:

Q. Mr. Hewes, before the recess I was asking you some questions about your statement, I believe. The question of whether or not you saw the wig-wag operating or not. Now, do you remember seeing the stand of the wig-wag, or do you remember that? A. I don't remember much about that.

Q. You don't remember seeing the stand of the wig-wag at all? A. No.

Q. Nor the post?

A. I didn't pay much attention to it.

Q. Yes, you didn't pay much attention. Now, then, Mr. Hewes, do you remember talking to a police officer, Officer Sublett—did he interview you after this accident? A. No.

Q. He didn't interview you at all?

A. Not that I can recall, he didn't.

Q. You didn't go into the highway patrol in Redding, then you weren't interviewed by any of the highway patrol officers?

A. Yes, interviewed by the coroner, but not by the highway patrol. [78]

Q. But not the highway patrol?

A. Not that I recall; I might have been.

(Testimony of Raymond Arnold Hewes.)

Q. Well, you remember if you were, wouldn't you? A. I don't recall that I was or not.

Q. You were interviewed by the coroner; where was that? A. In Redding some place.

Q. When was that?

A. That I couldn't tell you, because I don't know.

Q. Who was present?

A. The coroner, some officers.

Q. Anyone else? A. And John DeRosa.

Q. John DeRosa? A. Yes.

Q. You say you do remember that, but you don't remember being interviewed by the highway patrol?

A. No, I don't.

Q. You don't remember—to refresh your recollection, you were called into the highway patrol and being interviewed by an Officer Sublett, along with a Captain Foster at the highway patrol office at Redding a few days after the accident?

A. Oh, yes.

Q. You do remember that now? A. Yes.

Q. And at that occasion you knew those officers were investigating [79] the cause of this accident and the surrounding circumstances, didn't you?

A. Yes.

Q. And on that occasion they asked you questions about what you saw and what you knew, didn't they? A. Yes.

Q. And Mr. DeRosa, who was with you in the automobile, was also with you when they were asking those questions? A. Yes.

(Testimony of Raymond Arnold Hewes.)

Q. And when you answered those questions you were endeavoring to answer them to the best of your ability, truthfully, weren't you?

A. That is right.

Q. You weren't trying to hide anything, you were trying to cooperate with the officers?

A. That's right.

Q. And assist them in their investigation, is that right? A. That is right.

Q. Now, do you remember stating—tell us whether or not you stated to Officer Sublett in the presence of Captain Foster and Mr. DeRosa that you had no idea whether the signal was operating or not, that you couldn't say that it wasn't operating? A. Give it to me again.

Mr. Murman: This is a statement in writing or an oral [80] statement?

Mr. Phelps: Read the question.

(Question read.)

A. I don't know that I made that statement then or not.

Q. Will you say you didn't make that statement?

A. I won't say I didn't, but I might have, but I don't know for sure whether I did or not.

Q. And will you tell us whether or not on that same occasion, the same people present, you said that you didn't pay any attention to the wig-wag and didn't see it and wasn't looking for it?

A. Oh, no, I didn't say anything like that that I recall, I didn't—

(Testimony of Raymond Arnold Hewes.)

Q. Could you have said that to them?

A. I always look for signals on them crossings.

Q. My question, could you have said that to them, you think you might have?

A. I might have, but I don't recall saying it.

Q. But you might have told them?

A. I could have very handily, but I don't recall saying it.

Q. And you remember telling the coroner that you couldn't say one way or the other as to whether the signal was working or not, that you could not say that it wasn't working?

A. I told him as far as I was concerned it wasn't working because I didn't see it working. [81]

Q. That you didn't see it working, but you wouldn't say whether or not it was working, isn't that a fact?

Mr. Murman: That isn't his testimony. I object to it as not being the testimony——

The Court: Read the answer again.

(Answer read.)

Mr. Phelps: My question, if your Honor please, picked it up from there.

The Court: All right.

Q. (By Mr. Phelps): Didn't you tell him that you didn't know whether it was working or not and couldn't say that it wasn't working?

A. As far as I am concerned it wasn't.

Q. That is your best recollection?

A. That's right.

(Testimony of Raymond Arnold Hewes.)

Q. Now, how long after the accident did you stay around?

A. About 5—10 minutes, something like that.

Q. Did you stay long enough to see the ambulance arrive?

A. No, we come back when the ambulance was there. We went off to work, it was raining, so got laid off the job, and went back there. That is when the ambulance was there.

Q. That was later? A. Yes.

Q. When did you come back—how long before you went, continued on to your work, do you think you stayed? [82]

A. About 5-10 minutes.

Q. About 5 or 10 minutes. By that time had any police officer arrived.

A. I don't know. I think there was one there, a highway patrolman.

Q. Highway patrolman there at the time you arrived?

A. I think so.

Q. Do you remember what he looks like, can you describe him?

A. No, not now I can't.

Q. How was he dressed?

A. A policeman's uniform.

Q. A state highway patrolman's uniform?

A. State highway patrolman.

Q. Did you see him drive up in a state highway patrol car, a white car?

A. Yes.

Q. He drove up before you left?

A. Yes.

Q. You remember that now?

A. I am pretty sure it was before we left.

(Testimony of Raymond Arnold Hewes.)

Q. And right there at the scene of the accident before you left to go back to work, did he interview you? A. No.

Q. Did you volunteer to him at that time, state to him that you had seen the accident at that time? [83]

A. No, I don't believe I did.

Q. You did not? A. No.

Q. Did he inquire in your presence and ask whether among the group there had anyone witnessed this accident?

A. I don't know whether he did. I believe he did, I am not sure.

Q. He did? A. I think he did.

Q. You didn't volunteer and say you witnessed this accident, although you were right behind and saw the whole thing? A. That's right.

Mr. Murman: That is immaterial.

The Witness: I was behind and I seen the whole works.

Q. (By Mr. Phelps): And you didn't volunteer the state highway patrol officer that you witnessed—— A. Not that I recall, I didn't.

Q. Instead of that you left the scene of the accident without telling the officer how it happened, or telling anyone that you had witnessed it, is that right.

A. Well, I was kind of late for work, so I took off for work.

Q. And when you took off for work, had anyone else arrived in an official capacity?

A. I don't know.

(Testimony of Raymond Arnold Hewes.)

Q. Such as a coroner? [84] A. No.

Q. The town constable?

A. I think the constable was there; I am not sure.

Q. He was there in addition to the highway patrol?

A. I think he got there about eight o'clock. He got there after we left.

Q. He got there after you left? A. Yes.

Q. You are now talking about a constable?

A. Constable, yes.

Q. All right. You know who that constable was, you knew his name? A. Casebeer.

Q. That is the one that arrived after you left? He didn't arrive before you left, put it that way?

A. I don't think so.

Q. All right. Now then, how long were you away from the scene of the accident before you returned?

A. I don't know, about, oh, 20-30 minutes, I think.

Q. And when you returned had the ambulance, had it yet arrived?

A. Yes, the ambulance was there.

Q. And how long did you stay the second time when you were there?

A. I don't know, not very long; I don't know just how long.

Q. Well, 5-10 minutes, 20 minutes? [85]

A. About 10 or 15 minutes, or something like that.

Q. In this connection, did you talk to the high-

(Testimony of Raymond Arnold Hewes.)

way patrol officer who was conducting the investigation? A. Not there, I don't think I did.

Q. Did not. You didn't tell him that you had seen the accident and what had happened?

A. I don't believe we did, might have. I don't recall.

Q. And you didn't tell the constable?

A. No, we never talked to the constable at all.

Q. And you didn't talk to the coroner at the scene of the accident?

A. I don't think so; I wouldn't be sure about that.

Q. At the time you left on the second occasion, after having returned from work, had Mr. Shanahan been taken away in the ambulance?

A. He was just being taken away when we got there.

Q. Just being taken away? A. Yes.

Q. And on this second occasion when you went there, any *any* time did the highway patrol officer, or the constable, either one of them, ask in your presence whether there was anyone here who had seen the accident?

A. I don't know whether he did or not. I didn't talk to anyone, anyhow.

Q. A moment ago you said you were asked by the highway patrol—— [86]

A. The way they got it, the witnesses was—my brother-in-law's brother came down after we was there and he told them. That is after we went to work, he was working on the same job.

(Testimony of Raymond Arnold Hewes.)

Q. All right. Now, Mr. Hewes, before you left the scene of the accident to go on to your work, during this period of 5 or 10 minutes after the accident, can you tell us during that 5 or 10 minutes after the accident what the condition of the visibility was; had it yet gotten light?

A. Well, it was fairly light. I couldn't say it was light so as you could see too far, but you could see within a radius—I don't know just about how far.

Q. How far?

A. You could see the buildings around close there.

Q. And while you were still at the scene and hadn't left the scene of the accident, and while the highway patrol officer was there, can you tell us whether or not it was light enough so that you could see buildings and trees at a distance of one block, two blocks, three blocks——

A. I don't know about that.

Q. And what don't you know?

A. I never paid much attention about that.

Q. Do you know whether it had, the dawn had broken to such an extent that the sky was light——

A. It was still misty when we left there.

Q. Well, I am not asking—— [87]

A. It was so you could see at a fairly good distance.

Q. All right. Didn't need flashlights or lanterns?

A. No.

Q. In fact, you didn't need flashlights or lan-

(Testimony of Raymond Arnold Hewes.)

terns at any time after the accident; you didn't need a flashlight to go down to see the accident?

A. After the accident why you would.

Q. Did you have a flashlight?

A. I never had a flashlight because we were right there where you could see. Had to strike a match in order to read those papers.

Q. And how far were you away from the wreckage of the car when you saw it? A. How far?

Q. Yes.

A. About 140-150 feet, something like that.

Q. So you were up here on the crossing when you saw the wreck of the car down there?

A. That is right.

Q. You didn't need the assistance of any lights or headlights?

A. The lights from across the buildings. You could see there, but you couldn't read nothing.

Q. The answer to my question is then, you could see, is that right?

A. You could see from the lights. [88]

Q. From across the street? A. Yes.

Q. Whatever the cause or reason, the simple answer to my question, you could see the wreckage from the crossing?

A. That is right, the lights showed that up.

Q. Now then,—and that was immediately after the accident before you went down there?

A. It was right after the accident.

Q. Now, as this car came to a stop, Mr. Shanahan's car, which you subsequently found out was

(Testimony of Raymond Arnold Hewes.)

Mr. Shanahan's car, came to a stop, can you tell us where it was with reference to the little incline or up-grade that goes from Center Street?

A. It was towards the bottom of the incline.

Q. So that the front end of his car stopped at the bottom of the incline?

A. Yes, that is about right.

Q. Yes. And a little grade going up there, and that is the grade you have reference to?

A. Yes.

Q. It was only after then he started up after having come to a stop that he went up this incline and over the tracks?

A. Sure, he went over the tracks.

Q. I understand that, but what I am getting at is, he didn't progress up this incline any amount until after he had started up after he stopped? [89]

A. Started from the bottom and kept a steady speed.

Q. So that whatever other physical facts we can determine, the point that you can now fix the place where he stopped, was the front end of the car was at the bottom of that incline——

A. Just about the bottom of it, I would say, yes.

Q. All right. And you also stopped at that same place, is that right?

A. That is right. After he moved up that is about where we stopped when he was on the track.

Q. Now, when you came to a stop there, do you remember—let me withdraw that and get in the sequence of events.

(Testimony of Raymond Arnold Hewes.)

Mr. Shanahan started up from that point, the bottom of the incline, and then you started up?

A. That's right.

Q. Now, had you come to a stop at the bottom of that incline also? A. That's right.

Q. Before the accident or after?

A. Before the accident.

Q. You stopped about the same place?

A. That's right.

Q. Then did you start up again before the accident, or did you stay right there until——

A. I started to start up just before the accident.

Q. You had started to start up? [90]

A. That's right.

Q. And how far had you gone at the time of the accident? A. About three or four feet.

Q. So that you, in turn, had only progressed three or four feet up the incline?

A. Just got on the incline.

Q. At the time of the impact?

A. That's right.

Q. Now then, at the time of the impact, did you come to a stop or did you continue on?

A. No, I stopped.

Q. You stopped right where you were?

A. That's right.

Q. Since you had only gone three or four feet you were going so slow that you were able to stop within a matter of inches or feet?

A. That's right.

Q. Then did you remain in that position, three

(Testimony of Raymond Arnold Hewes.)

or four feet up this incline, from that point until after the train cleared the crossing?

A. That's right.

Q. And it was only after that that you left that point and crossed the crossing and went down to the car?

A. After the train passed through, why, we crossed across and stopped.

Q. Now, you say you saw a light on the locomotive before the [91] impact; is that correct?

A. That's right, just before.

Q. That was the headlight of a locomotive?

A. That's right. I wouldn't know whether a locomotive, it was a passenger train.

Q. A passenger engine drawing the passenger train?

A. That's right.

Q. Did you see that just as it passed the line of the station house?

A. Just as I pulled up there, why, I seen; that is why I stopped.

Q. My question is, did you see that light as it came out from behind——

A. (Interrupting) That's right.

Q. ——the station? A. That's right.

Q. But you saw it just as it came out from behind the station? A. That's right.

Q. The only thing from the point where you were when you saw the light which obstructed your view at all was the station itself?

A. That's all.

Q. And you saw it just as soon as it came out from behind? A. That's right.

(Testimony of Raymond Arnold Hewes.)

Q. And then you saw the locomotive as it continued on and into [92] the automobile?

A. That's right.

Q. Now, at the time you saw that light as it came out from behind the station, the other side of the station, where was the car driven by Mr. Shanahan?

A. The back end was right about the middle of the track.

Q. What track?

A. The middle track, the main line.

Q. Will you come down and draw that for us, please?

(Witness went to the blackboard.)

Q. All right, just mark that 7. Draw a line down to that and mark it R.H.-7, and that indicates the position of Mr. Shanahan's automobile as the locomotive came out from—into view, the headlight of the locomotive came into view by the station.

A. Just a little beyond the station, that is right.

Q. And you indicated the front end of that car by an arrow. Regardless of the scale, you are putting the front end of the car in that position, indicating the front end—

A. That is right about here. He was hit right where the back end is (indicating).

Q. Were you playing your radio in your car?

A. No, it was out of order.

Q. Were you talking to Mr. DeRosa as you were coming?

A. Not at the time, not until after we stopped.

(Testimony of Raymond Arnold Hewes.)

Q. Just one other thing. Can you tell us your estimate that he stopped from the—a minute to a minute and a half—I take it that is your estimate, but is it fair to say that whatever time it took him to do what you have told us you observed him doing, wiping the front of his windshield, that was the time that he was at a stop; is that right?

A. That's right.

Mr. Phelps: I have no more questions.

Redirect Examination

By Mr. Murman:

Q. As a matter of fact, Mr. Hewes, you were wiping your windshield first, weren't you?

A. That's right.

Q. Was he stopped at the time you wiped your windshield?

A. That is right, he was stopped. I pulled up just right behind him, and I started wiping my windshield off.

Q. He came to a stop before you came to a stop?

A. That's right.

Q. After you wiped your windshield off, you looked through and saw him wiping his?

A. That's right.

Q. And it was after that then that he moved forward, is that correct?

A. That's right.

Q. Now, we have here defendant's exhibit A in evidence. Have you seen that picture before? [94]

A. I haven't seen it before, no.

(Testimony of Raymond Arnold Hewes.)

Q. You hadn't——

A. That is the crossing, yes.

Q. Now, will you mark on here, having in mind that this is the stop sign and the crossing where the accident occurred; isn't that right?

A. That's right.

Q. Will you mark on here where the front end of Mr. Shanahan's car was when he came to a stop with relation to the stop sign at the crossing. Just put it on the railing here. Is that the place where I am putting this cross?

A. Right there. (Indicating.)

Mr. Phelps: May I see it?

Mr. Murman: Let the record show, if the court please—that the witness has placed an "X" on Defendant's A in evidence, at a point on the Howard Street crossing, shown in that photograph, which is on the right-hand side of the photograph.

Q. (By Mr. Murman): Now, Mr. Hewes, in addition to addition to one of the other persons that questioned you, you were questioned by Mr. Whitfield, were you not? A. I think so.

Q. You remember him, don't you?

A. I don't remember him, no.

Mr. Murman: Will you stand up, Mr. Wickfield?

Q. Do you remember that gentleman?

A. Yes.

Q. Was he one of the gentlemen that questioned you? A. That is right.

Q. Do you recall him questioning you?

A. No, I don't remember him questioning me, no.

(Testimony of Raymond Arnold Hewes.)

Q. I show you what purports to be your signature, and ask you if that is your signature?

A. That is right.

Q. That is your signature? A. Yes.

Q. Would the date here of December 29th, 1948, refresh your recollection as to when he questioned you?

A. I guess it was around that time, some time; I don't know exactly when it was.

Q. Did you sign this paper at or about that date?

A. That is about right, yes.

Mr. Phelps: May I see it?

Mr. Murman: Yes.

Q. (By Mr. Murman): Do you remember at the time he questioned you——

Mr. Phelps: Just a minute, I object to anything as to what he told Mr. Wickfield, because he put this witness on the stand and he is trying to cross-examine his own witness.

Mr. Murman: No. [96]

Mr. Phelps: You want to cross-examine him?

Mr. Murman: I want to know whether he made the statement to Mr. Whitfield. You opened up the subject of statements.

Mr. Phelps: My objection is your are cross-examining your own witness. Hearsay and self-serving declaration what he said to somebody else.

The Court: I am not so sure of that. There is a case that was tried three or four years ago.

Mr. Phelps: In this, it would be a prior consist-

(Testimony of Raymond Arnold Hewes.)

ent statement and I shouldn't think it would be admissible.

Mr. Murman: That is what I want to show. I want to show it is a prior consistent statement.

The Court: If that is what you want—I have forgotten the name of that case.

Mr. Murman: I do not recall, but I think as long as Mr. Phelps opened up the subject, it is well within the rights of the plaintiff to show Mr. Hewes made a prior consistent statement.

The Court: That was the ruling I had in mind.

Mr. Phelps: The rule I have in mind—that is the law, of course. This was—it bears a later date than the statement which is in evidence.

Mr. Murman: By one day.

Mr. Phelps: Well, then it wouldn't be prior. It could be but one minute and not be prior. The rule wouldn't apply [97] if it were afterwards. I object to it on that ground.

Mr. Murman: You were talking about statements made to the Highway Patrol two or three days later, and reading statements made to the Coroner. This is certainly prior to those statements.

Mr. Phelps: Then, of course, if that is the purpose of the testimony, it isn't admissible at this time because I have only laid preliminary ground for the impeaching question. The other testimony is not yet in.

The Court: Sustain the objection at this time. I would like to have you bring to me that—I wish I could remember the name of that case—in that case,

(Testimony of Raymond Arnold Hewes.)

the rule about consistent statements is announced. It must have been five or six years ago, a case tried before Judge Fitzpatrick in the Superior Court.

Mr. Phelps: I can't remember. I have some recollection.

The Court: I do.

Mr. Murman: This witness has been interrogated by Mr. Phelps and he has gotten definite answers from this witness concerning oral statements made subsequent to this statement. Under those circumstances, whether or not he has produced the other persons, certainly at this time it would be within the rights of the Plaintiff to have him identify this statement as a prior consistent statement, for what it is worth, and then it is a question of weight. The question would be for the Jury [98] what weight the Jury wants to give it.

The Court: I understand that. Of course, everything is what weight they want to give it. On the other hand, I would like to read that rule myself. I have forgotten it. I will exclude it at the present time, without prejudice to your trying to put it in again if I should change my ruling.

Mr. Murman: Of course, I am up against this difficulty. This gentleman here is down from Redding and wants to get back very badly, and if I have to hold him, it makes it difficult in this regard, but I will bow to the Court's ruling.

Mr. Phelps: May I see the statement. Maybe we can agree on something.

The Court: I am inclined, in view of the con-

(Testimony of Raymond Arnold Hewes.)

venience of the witness to allow the statement in and then admonish the Jury to disregard it in the event I consider it shouldn't be admitted.

Mr. Phelps: If the Court please, I might say as far as that is concerned, I just intend to ask—I fully intend to ask the Court order this witness to remain until tomorrow because I have some things I am trying to find out about now that I want to interrogate him about.

The Court: All right, if that is what you are going to do then my ruling will stand until tomorrow. In the meantime, you can find that authority for me. I know they are all collated and that particular case I spoke—I can't remember the name [99] of it.

Mr. Murman: Do I understand that Mr. Phelps is going to call Mr. Hewes tomorrow as a witness?

The Court: He says he is going to ask him to remain until tomorrow.

Mr. Murman: I assume for the purpose of recalling him, then, tomorrow.

The Court: Yes. Is that so?

Mr. Phelps: Yes, if Your Honor please. There are some matters I am checking into. I have a long-distance telephone call about it, and I am about to ask the Court at the conclusion of this witness' testimony for permission to ask him to remain so that I may direct some further questions to him on cross-examination.

Mr. Murman: I have no further questions of the

(Testimony of Raymond Arnold Hewes.)

witness at this time, with the understanding that I still have this matter of the statement, Your Honor.

The Court: Yes:

Mr. Phelps: I was trying to see if there was anything we could agree on.

Mr. Murman: It is only for that one portion I am interested in at the moment.

The Court: Did I understand you to state, Mr. Phelps, you expect to show these so-called inconsistent statements made to the Coroner and to the Patrol Officer, and all that? [100]

Mr. Phelps: By testimony, yes, your Honor.

The Court: By testimony?

Mr. Phelps: Yes.

The Court: So that being the fact, this was given at a prior time, if that is your object I think then I will let the statement come in.

Mr. Murman: That is the purpose of the offer.

Mr. Phelps: My point, if your Honor please, is that this statement of course was prior to the one that is in evidence. The other statements which were made, I am frank in this position, that is the thing I want to find out, exactly when they were made. I think they will be determined to be prior to this statement which is in evidence, and I have a long-distance phone call. I want to address some other questions with respect to the same thing, and I think no harm can come from reserving ruling temporarily until tomorrow.

The Court: Of course, this witness is far away from home and comes down——

(Testimony of Raymond Arnold Hewes.)

Mr. Phelps: I can understand that.

The Court: —and it is close to Christmas. I don't want to keep him here unless I can't avoid it.

Mr. Phelps: I would be prejudiced if this witness did not take the stand again, I assure you.

Mr. Murman: My understanding of this witness' testimony was that he gave no oral statements subsequent to this particular [101] date. I will ask him a direct question.

Q. (By Mr. Murman): When you talked to the Highway Patrol people and the Coroner, was it after the time you talked to Mr. Whitfield?

A. I don't remember whether it was or not.

Q. You don't know?

A. No, not for sure.

Mr. Phelps: His recollection was that it was not, Your Honor.

Mr. Murman: Well, I didn't have that recollection as to his testimony.

Q. You don't know one way or the other on it?

A. No, I don't know. I wouldn't say one way or the other, because I don't know.

Mr. Murman: Well, my understanding of this witness' testimony was that he gave a couple of oral statements subsequent to this particular date. I have no further questions of this witness.

Mr. Phelps: I have none, if your Honor please. I should like an order requiring the witness to remain in attendance until tomorrow at 10:00 o'clock.

The Court: Will that inconvenience you very much?

(Testimony of Raymond Arnold Hewes.)

A. If you say to stay, I will stay. I would like to get gone, but it doesn't matter one way or the other.

The Court: All right, I will ask you to return at 10:00 o'clock tomorrow morning. [102]

A. Okay.

(Witness excused.)

Mr. Murman: Mr. Hewes can leave for the afternoon, can he?

The Court: Oh, yes.

JOHN L. DeROSA

a witness called on behalf of the plaintiff, sworn.

The Clerk: State your name, please.

A. John L. DeRosa.

Direct Examination

By Mr. Murman:

Q. Mr. DeRosa, you have appeared here pursuant to a subpoena which was issued by the plaintiff? A. I have.

Q. Where do you live?

A. I live at the present time in, just about one mile out of Cottonwood.

Q. Where is that? A. California.

Q. Near Redding?

A. It is approximately 16 miles south of Redding.

Q. About a year ago where were you living?

(Testimony of John L. DeRosa.)

A. I lived approximately six miles east of Redding out on Highway 44.

Q. Was that in the same locality that Mr. Hewes' lived? A. Yes. [103]

Q. What was your business at that time?

A. I worked for the Arrowhead Lumber Company in Anderson.

Q. Was that the same organization that Mr. Hewes worked for at the time? A. Yes.

Q. Do you recall December 27, 1948?

A. I do.

Q. Do you recall the morning of that day?

A. Yes, sir.

Q. Did you leave the place where you were living at that time on the morning of that day?

A. Yes, sir, just about our usual time.

Q. About what time was that?

A. Well, we would have left home just a few minutes right after 7 o'clock; maybe ten minutes or so.

Q. That was Daylight Saving Time?

A. Yes.

Q. And as you left home, did you notice whether it was dark or not? A. Yes, it was dark.

Q. How about the weather? Was it clear or rainy?

A. Well, it was kind of misty, and I wouldn't say it was really raining, but just kind of a general fog showing.

Q. Were you alone or with somebody when you left?

(Testimony of John L. DeRosa.)

A. I rode to work with my brother-in-law. We exchanged rides. [104] He would drive a certain number days, then I would drive so many days.

Q. On this particular day, you were riding with him? A. Yes.

Q. You were the passenger?

A. I was the passenger.

Q. Where did you go from your home in order to get to work that morning?

A. Well, we came across a shorter route, across the river to Anderson and came into Anderson from the north—northeast, really, it would be.

Q. That is a little town just south of Redding?

A. Yes.

Q. Did you have to use the headlights to come into Anderson? A. Yes.

Q. It was dark, was it? A. Yes.

Q. How about the windshield wiper?

A. Had to use the windshield wiper to clear the moisture off the windshield.

Q. When you got into Anderson, where did you go, what part of Anderson?

A. We came in Anderson from the east on North Street.

Q. Where did you go on North Street?

A. We usually crossed at North Street Crossing to get on the [105] main highway on the opposite side of the tracks.

Q. Did you go to North Street Crossing this day?

(Testimony of John L. DeRosa.)

A. Yes, we went to North Street Crossing and found that there was a freight train across the crossing.

Q. Are you familiar with this map? You have north to your right, south to your left, west to the top and east to the bottom. These six parallel lines represent three separate railway tracks.

A. Yes.

Q. Which of the three railway tracks was the freight train on? At the North Street Cross?

A. Well, I wouldn't be sure about it. I never paid special attention to it.

Q. You don't know which of the three tracks the freight train was on?

A. I believe it was on the far track, but my belief is just from general knowledge that that is the siding.

Q. The train engine was at a standstill was it?

A. Yes.

Q. How could you see the train there? How did you happen to see the train there?

A. I saw it more or less from the silhouette of it caused from the lights across the highway.

Q. On the other side? A. Yes. [106]

Q. This was the highway on the west side, is that right? A. Yes.

Q. From the headlights of the cars on that side, you could see the silhouette of the train?

A. Not so much the cars, you know, but there is a service station right across the street from the North Street Crossing, and the buildings also.

(Testimony of John L. DeRosa.)

Q. Did you notice anything else at that crossing at that time?

A. Yes, sir. There is a signal there with two red flashing lights off and on to warn traffic.

Q. Was it operating?

A. Yes, it was operating.

Q. Was there any bell ringing or was it just a light flashing?

A. Well, I never heard any bell.

Q. You never heard any bell? What did Mr. Hewes do after you and he arrived there in his automobile and found the freight train at the crossing?

A. Well, we pulled up there and he just paused for a moment, and then he swung to the left, that would be south on Center Street.

Q. On West Center Street? There are two Center Streets,—East Center Street?

A. That would be East Center Street.

Q. Yes. Did you go to the next crossing? [107]

A. Yes.

Q. What did you see there?

A. We saw the freight train, the tail of the freight train was across that crossing also.

Q. Did you see that tail of the freight train by the same means—

A. Yes.

Q. —as you saw the freight train up there?

A. Yes.

Q. The lights behind it, is that right?

A. Yes.

(Testimony of John L. DeRosa.)

Q. It was still dark when you were at this crossing, was it? A. Yes, it was still dark.

Q. Then what happened?

A. Well, we came on down south, down East Center Street to come across one of the other crossings.

Q. Did you notice anything in the way of an automobile ahead of you as you came down East Center Street? [108]

A. Yes, we pulled up behind a coupe just as we were coming near the Howard Street crossing.

Q. Will you come down to the board, Mr. DeRosa, and mark on this map about where you remember seeing the coupe for the first time?

A. (Leaving witness stand): Well, I would say approximately right in here some place (indicating).

Q. We will put a cross there. Is that right there? A. Yes.

Q. We will call that "D-1." What is your best recollection as to where the car you were riding in was at the time you saw the coupe at D-1?

A. Well, we were up fairly close behind him.

Q. Will you make a mark where you recall your car to be?

A. Well, somewhere right in here (indicating).

Q. "D-2." Now, what happened to the car that you first noticed at D-1, where did it go?

A. Well, it proceeded on to this crossing here and stopped at the stop sign.

(Testimony of John L. DeRosa.)

Q. Will you make a mark where you remember it stopped at the stop sign?

A. Well, this is the edge of the right of way, is that right?

Q. About where? I am not sure.

A. It would be just approximately right in this locality right here (indicating). [109]

Q. Use the red pencil and make a mark.

A. A cross?

Q. Yes.

A. It would be approximately right there.

Q. Call that "D-3." Where did the car that you were in go after the car ahead of you came to D-3?

A. We pulled up right behind him and stopped with possibly ten feet between our car and his.

Q. Will you make a mark where your car stopped?

A. It would be right in here some place (indicating).

Q. Call that "D-4." Now, you say that the car ahead of you stopped at the stop sign. Which side of the crossing was the stop sign on?

A. It would be on the east side of the tracks on the right-hand side of the crossing.

Q. Will you make a mark about where you can recall a stop sign?

A. It would be right in here, about (indicating).

Q. Call that "D-5." Now, had you been across that crossing before?

A. Well, yes, many times.

(Testimony of John L. DeRosa.)

Q. Can you tell us whether or not, on the day that we are speaking of, December 27, 1948, whether or not there was a wig-wag signal there any place?

A. Well, I can only tell you by times that I had seen it previously. [110]

Q. Well, where did you see it previously?

A. It was approximately right here on the north side of the crossing (indicating).

Q. Will you put an "X"?

A. Right in there (indicating).

Q. "D-6." All right, will you sit down, Mr. DeRosa?

(The witness resumed the witness stand.)

Q. Now, how long did the car ahead of you remain stopped at D-3, so far as you can recall?

A. Well, he stopped there for just a little while, just a moment or so, long enough to reach forward and clear some of the mist off the inside of his windshield. I imagine it would be, oh, I am a very poor judge of time.

Q. Did you see him clear the inside of his windshield?

A. Yes, I could see it, could see the silhouette—well, it would be the silhouette of him through the car from the lights on the other side.

Q. Did you do anything similar in your car?

A. Yes, Mr. Hughes was wiping the windshield off and I also wiped the side in front of me off.

Q. When you saw the man ahead of you wiping his windshield, was it before or after you had wiped the windshield in your car?

(Testimony of John L. DeRosa.)

A. Well, it was probably before.

Q. Did the car that had stopped at D-3 move forward before you finished wiping your windshield? [111]

A. Well, I don't think it did. He stopped and didn't seem to be in any particular hurry to go ahead and proceed. He took quite a bit of care in wiping it off.

Q. Would you say this, that he was there as long as you were stopped behind him?

A. Well, I believe we started forward at just about the same time; well, just maybe just a moment after he did.

Q. He had already come to a stop before you drew up behind him, is that correct?

A. Yes.

Q. As you stood there, or as your car was stopped there, you were seated on the right of the driver, weren't you?

A. On the right-hand side.

Q. Did you look forward across the railroad tracks to the west Center Street side of the crossing at all? A. No, I don't remember doing so.

Q. As you were seated in the car, were you looking through the windshield?

A. Yes, I was looking at the car and general surroundings.

Q. That would be, when you say "general surroundings," where do you mean? In the vicinity of the car and beyond?

A. In the vicinity of the car, yes.

(Testimony of John L. DeRosa.)

Q. As the car ahead was started up—it did start up, didn't it? A. Yes. [112]

Q. Did it go forward gradually or did it start up quickly?

A. No, it seemed to just move forward gradually, like he would have it in the first gear.

Q. Have you any way of estimating the speed of the car as it went forward?

A. Oh, I would say it didn't go over, oh, five miles an hour.

Q. And did Mr. Hughes follow along behind him?

A. Well, we pulled ahead just, oh, maybe 25 feet past the position where he had stopped.

Q. The car that you were in went forward and came a little bit past or past where——

A. Where we had pulled up.

Q. ——the car ahead of you had been?

A. Yes, we pulled up a little bit behind where he had stopped.

Q. Have you any way of telling us the distance, how far that would be, when you say "a little bit"?

A. Well, possibly the length of a car.

Q. Could you step down here again and mark the position of Mr. Hughes' car when you came to the second stop after the car ahead of you had gone forward?

A. (Leaving witness stand): Yes, we stopped right in this vicinity here.

Q. We will call that "D-7." When you were

(Testimony of John L. DeRosa.)

stopped at D-7, where was the car that had been ahead of you?

A. Well, it was still going in front of us, going on across the [113] tracks, across the crossing.

Q. About how far ahead of you was it, would you say? Can you estimate it in car lengths?

A. Well, it was probably two or three car lengths, something like that.

Q. And did it proceed along at about the same speed? A. Yes.

Q. Same speed you have mentioned, about five miles an hour?

A. Yes, about five miles an hour.

Q. Did you watch it?

A. Yes, I watched it all the time.

Q. What happened?

A. Well, he just went right on across the crossing, and just as his car got right across the main line I noticed the train come down the track.

Q. What did you see of the train as it was coming down the track?

A. I saw the headlight first, and then just almost instantly I saw—I heard the horn or whistle, whatever they have, I don't know which it is, blow.

Q. At that time you were at D-7, as you have marked it? A. That is right.

Q. Is there anything you can tell us about where on the track the train was when the whistle blew? Have you any way of telling us that? [114]

A. Well, I would say it couldn't have been

(Testimony of John L. DeRosa.)

possibly over 200 feet up the track from the crossing.

Q. Well, is 200 feet about your judgment?

A. Yes.

Q. Is there some way that you could—well, let me ask you this question: As you were here and saw the headlight beam, about where in the track did you see the beam first?

A. Well, kind of hard to say. I would say just almost opposite the depot, right in here (indicating).

Q. Will you make a mark there? We will call that "D-8." That is where you first saw the beam, is that right? A. That is right.

Q. Was it passing that point that you heard the whistle?

A. Yes, just an instant, almost at the same time.

Q. Do we understand that is about where the front of the engine was when you heard the whistle?

A. Yes.

Q. Referring now to D-8, this mark that you have made—— A. Yes.

Q. How much time elapsed, if you can give us your judgment, of the time, between the time you heard the whistle at this point, about D-8, and the time the collision occurred?

A. Oh, well, as I said before, I am an awful poor judge of time. I don't know.

Q. Was it a short interval or long interval?

A. Just an awful short interval.

Q. Awful short interval? A. Yes.

(Testimony of John L. DeRosa.)

Q. Would you say it was an instant?

A. Well, probably an instant.

Q. Could you give an estimate of the speed of that train?

A. Well, I estimate it to be exceeding 60 miles an hour, anyhow.

Q. Up to the time you had seen the headlight at D-8 and the whistle at that point, had you seen anything in this vicinity to indicate a train was coming?

A. No.

Q. Did you look in the direction, as you moved from where—as you moved from the point where you first came to a stop at D-4 to the second point at D-7, did you look across the intersection at all?

A. I don't remember doing so, no.

Q. Were you standing looking forward at the automobile?

A. Yes.

Q. Did you see anything in motion in the vicinity of D-6 at that time?

A. I never, no.

Q. Did you see any lights in the vicinity of D-6 at that time?

A. No.

Q. You didn't? [116]

A. No, I never.

Q. Now, after the—you can go back to the witness chair.

(The witness resumed the witness chair.)

Q. After the collision occurred, what did you do, remain in the car or did you get out?

A. I remained in the car.

Q. Where did the car go, or did it move?

A. I didn't quite follow you.

(Testimony of John L. DeRosa.)

Q. Did the car remain at this point, at D-7, as you marked it, or did it move from that point?

A. I understand you are referring to our car?

Q. Yes, that is right.

A. We remained right there.

Q. How long?

A. Well, just long enough for the train to clear the crossing.

Q. The train cleared the crossing?

A. Yes.

Q. Did it stop down the line somewhere?

A. Well, at first, I didn't think it stopped, but later I looked down the track and saw it.

Q. You could see the rear of it, could you?

A. Yes.

Q. When the collision occurred, was it still misty? A. Yes.

Q. And was the windshield wiper still going on your car? [117] A. Yes.

Q. How about the headlights; were they still on?

A. Well, the headlights were still on.

Q. Referring to the car ahead of you, was there anything lighted on that car?

A. Well, I never paid special attention. I do remember the tail light being on. I also remember the tail light being on after the collision when we went over to the wreck.

Q. You saw a tail light on the car after it was wrecked? A. Yes.

Q. "Burning" when you say "on," is that right?

A. Yes, burning, lit.

(Testimony of John L. DeRosa.)

Q. By the way, did you know who was driving the car at the time of the collision? A. No.

Q. Did you know Mr. Shanahan before the collision? A. No, I didn't know him.

Q. Or his wife, Mrs. Shanahan?

A. No, I didn't know either of them.

Q. After the train cleared the crossing and stopped down the line, as you said, did the car in which you were riding move forward?

A. Yes, we moved forward at a slow rate of speed and crossed the tracks and stopped again.

Q. And then what did you do? [118]

A. Well, both I, my brother-in-law, jumped out of the car and ran down the tracks to see if we could render any assistance to the occupants.

Q. And what did you see down the tracks?

A. We first came to a—the body of the man that we later learned was Ellis Shanahan.

Q. And did you check his pulse, or anything?

A. Well, my brother-in-law, Raymond Hughes, checked his pulse and said he couldn't feel any pulse, and I, myself, gathered up some of the papers and his wallet that had been thrown out there on the tracks, gathered it up and laid it beside the body.

Q. Did you note whether he was breathing or not?

A. He wasn't breathing, to my knowledge.

Q. Now, did you go past the body to where the car was? A. Yes.

(Testimony of John L. DeRosa.)

Q. By the way, which side of the main track did you find the body on?

A. Well, it was on the west side between the tracks and the highway.

Q. And do you know about how many feet beyond the crossing it was? Have you any idea?

A. Well, I would estimate it at approximately a hundred and twenty feet, something like that.

Q. And how about the wreck? About how much further beyond the body was it? [119]

A. Oh, approximately twenty or thirty feet farther.

Q. I show you Plaintiff's Exhibit 7 in evidence, and ask you if that is a picture of the wrecked automobile? A. Yes.

Q. And it was on that wreck that you still saw the tail light burning, is that right? A. Yes.

Q. Now, after you viewed the wreckage of the car, what happened? Did you do anything further?

A. Well, we decided—well, we looked in the car to see if there was anybody else in the car and there wasn't, so we decided we couldn't be of any assistance, and we were supposed to be at work at eight o'clock, so we went back and got in our car and went on to work.

Q. Can you tell us about what time the accident occurred?

A. Well, I would say about twenty minutes to eight.

Q. And at the time, was it still dark?

(Testimony of John L. DeRosa.)

A. Yes, it was pretty dark.

Q. And when you say twenty minutes to eight, you are referring to daylight saving time?

A. Daylight saving.

Q. Now, I show you Plaintiff's Exhibit 3—this is in evidence, isn't it, Mr. Clerk?

The Clerk: Yes, sir.

Q. (By Mr. Murman): Plaintiff's Exhibit 3 in evidence, and [120] ask you if you can identify that photograph? A. Yes.

Q. About from what point was that picture taken, if you can tell us?

A. It would be approximately what you would see if you stopped at the stop sign on the east side of Howard Street crossing and looked north.

Q. And will you—you are now referring to this mark you made here at D-3, where the car ahead of you stopped, is that right?

Mr. Phelps: Now, I will object to the last one, if your Honor please. I didn't object to the first one. The place was designated; he can't express the opinion of the driver, what he could have seen——

The Court: I don't think he made that statement.

Mr. Phelps: Where he stopped, I thought, was the purpose of the question.

The Court: Read the question.

(Question read.)

The Court: I think I will allow the answer. It

(Testimony of John L. DeRosa.)

is a repetition of the previous answer. Are you going to be much longer with the witness?

Mr. Murman: No, I think that he is now ready for cross-examination, Judge.

The Court: I don't want to hurry you.

Mr. Murman: I was just turning it over to cross-examination. [121]

The Court: We will take a recess.

Take a recess, ladies and gentlemen, for ten minutes. In the meantime, bear in mind the admonition that I have heretofore given you.

(Short recess.)

Q. (By Mr. Murman): I have just one question. Mr. DeRosa, did you see any flagman around that crossing on that morning?

A. No, I didn't.

Mr. Murman: No further questions.

Cross-Examination

By Mr. Phelps:

Q. Mr. DeRosa, you left your home after arriving. About how far is your home from the scene of this accident?

A. Well, I would say approximately nine miles.

Q. And, I take it, Mr. Hughes picked you up, and after picking you up, you went straight to the place where the accident happened? A. Yes.

Q. And your place is from east and north of Anderson? A. That's right.

(Testimony of John L. DeRosa.)

Q. And you came in on North Street, is that right? A. That is right.

Q. You were driving, then, as you came into Anderson, you were driving west on North Street?

A. That is right. [122]

Q. Until you came to the intersection of that North and Center Streets? A. That is right.

Q. Now, then, you continued on after observing the crossing was blocked by a freight train, you continued then turning to your left and went down Center Street? A. Yes.

Q. In a southerly direction? A. Yes.

Q. You didn't stop and wait at that crossing, you simply turned and went on down Center Street?

A. We paused momentarily at North Street crossing.

Q. What I mean, you didn't stop and wait?

A. We didn't stop and wait.

Q. For the train or for the other train to clear; you simply turned, did you not, after pausing?

A. Yes.

Q. Did you come to a full stop or slow down and turn?

A. Well, I believe we just paused momentarily. He undoubtedly put the car in low gear to start again.

Q. But you didn't come all the way up to the tracks and have to back up and turn around?

A. No, not that as I remember it.

Q. And you turned left and then continued on

(Testimony of John L. DeRosa.)

down south on Center Street; you didn't turn into the crossing at Ferry [123] Street, did you?

A. Not that I remember.

Q. You could see that the freight cars were across Ferry Street without turning into Ferry Street and directing your headlights on them?

Mr. Murman: Is that a question?

Mr. Phelps: Yes.

The Witness: You want me to answer that?

Mr. Phelps: I will rephrase it again.

Q. You didn't—you did not turn into Ferry Street? A. Not that I remember.

Q. And you did see the freight cars still blocking Ferry Street without turning in?

A. Pardon?

Q. You observed the freight cars still blocking Ferry Street?

A. I observed the freight cars still obstructing the crossing.

Q. Yes. Then you continued on down here past the depot and then you saw the car which later you learned was driven by Mr. Shanahan, and at the point which you have identified as D-2; is that correct? I am now pointing to the place where the car was, or is that where you were?

Mr. Murman: Better have him come down and look.

Q. (By Mr. Phelps): I think it was D-1. You tell me where it was. Let me see what my notes say.

(Testimony of John L. DeRosa.)

The Witness: Mr. Shanahan's was where it is marked D-1. [124]

Q. Marked D-1.

A. Our car was marked where it is D-2.

Q. Now, you didn't see Mr. Shanahan's car before you reached this point, D-2?

A. I think not.

Q. And at that time—will you draw the diagram to indicate, a rectangle, to indicate the direction which your car was headed and the front end of it, and where it was? See what I mean? I mean, draw a rectangle, indicating the car.

A. You want me to draw that on the map?

Q. Yes, right on the map.

A. I would estimate his car——

Q. I say yours.

A. I am sorry. Well, I would estimate our car was just about like this (indicating).

Q. And what is your estimate of the distance from the front end of your car to the front end of his car at the time you first saw—to the rear end of his car, when you first saw it?

A. Well, not——

Q. In feet, if you can.

A. We were up rather close. I imagine it would possibly be fifty feet, or so.

Q. All right. Now, for the record, Mr. Murman, the witness did draw a parallelogram across D-2. You can take the stand again, if you will, please. You will be more comfortable. [125]

At the time, Mr. DeRosa, that you saw the

(Testimony of John L. DeRosa.)

Shanahan car, did you observe its speed at that time as it was going along?

A. I didn't observe just what—just exactly how fast it was going, no.

Q. And at that time, at the time you saw it, had it yet—withdraw that. At the time you saw it, when you first saw it, had he yet made his right-hand turn into the crossing street?

A. No, I don't believe he had.

Q. All right. A. Otherwise——

Q. You saw him make that turn——

A. To add a little bit to the statement I just made, he wouldn't—his car wouldn't come squarely parallel with Center Street making that, had just kind of made a sweeping "S."

Q. You mean making a sweeping "S" out of Howard Street and turning left, and then turned right into the Howard Street crossing?

A. Yes, assuming he came out of Howard Street, yes.

Q. Well, you didn't see him before the point where you saw him?

A. I don't know that he came out of Howard.

Q. You don't know one way or the other?

A. No.

Q. Your brother-in-law, you testified you saw it before he did, is that right?

Mr. Murman: I will object to what his brother-in-law [126] testified——

Q. (By Mr. Phelps): You don't know when he saw the car? A. No.

(Testimony of John L. DeRosa.)

Q. As far as you are concerned, you don't know where it came from?

A. I don't know where it came from.

Q. All you know is that you had come a distance of two blocks on Center Street and you didn't see it at any point down those two blocks on Center Street?

A. I did not.

Q. And you didn't see it, then, until you came into the intersection of Center and Howard?

A. Well, it—yes, that would be approximately right.

Q. I assume you were paying attention to where you were going, weren't you, as you were going down those two blocks?

A. Well, yes.

Q. And you were looking forward through the windshield?

A. Yes.

Q. Now, as the car driven by Mr. Shanahan came to a stop, can you locate the place where that car stopped with reference to the incline there at the crossing?

A. Well, I believe that he stopped right at the foot of the incline.

Q. You mean—pardon me, had you finished?

A. Yes. [127]

Q. You mean by that, the front end of his car was at the bottom of the incline?

A. Yes.

Q. And so that, without regard to any other physical obstruction or any other mark you might have put on the map, your recollection there and then at the time when you observed him was he

(Testimony of John L. DeRosa.)

stopped with his front end at the bottom of this little incline? A. Yes, approximately that.

Q. And that it was only after he stopped that he went up this incline to reach the grade and level of the tracks? A. Yes.

Q. In other words, when he stopped, so it will be perfectly clear, his car was on the level of the grade of Center Street itself? A. Not exactly, no.

Q. Well, it was still at the bottom of that little incline and hadn't yet gone up the grade off of Center Street, isn't that right? A. Yes.

Q. All right. Now, you came to a stop behind him, is that right? A. Yes.

Q. When you came to a stop behind him, you were directly behind him, was your car headed in the same direction as his [128] car, or was it at an angle with his car?

A. Well, we would be in somewhat of an angle to him.

Q. Suppose you come down to the board, then, and draw in the two cars as they were both stopped, yours beside the Shanahan car and the Shanahan car before he went over the crossing? Will you draw that in?

(Witness at the blackboard.)

Q. Now, I don't know how to ask you to do that with all these other marks on the board. Suppose you take a regular lead pencil and do it.

A. Well, I believe the car would be bigger than I am drawing here.

(Testimony of John L. DeRosa.)

Q. I think it would. Do you want to make a—do you want to make it a little bigger, then?

A. Something like that (indicating).

Q. All right. Well, now, I think it is apparent that it isn't drawn accurately to scale, but, at any rate, the points that you have indicated, the relative—I may have to darken it—this relative position—these relative positions of these two cars as they were stopped, and this is in lead pencil, and I will draw an arrow to—let's see. This will be D-9.

Mr. Murman: That's right.

Q. (By Mr. Phelps): And that will indicate the position of the Shanahan car as it stopped, and we will draw this D-10 and make it the position of your car after it stopped behind [129] the Shanahan car, and we understand it isn't drawn exactly to scale, but can you say that the front end as it is indicated there, the approximate position of the front ends of the two cars?

A. The front end of it would be approximately—I might have made just a little mistake in the tilting of it somewhat; I don't know.

Q. What do you mean by that; the angle in which they were in the street? A. Yes.

Q. Well, if there is any mistake, why not correct it now? Can you tell us in which respect and which ones?

A. Well, his car would probably have been tilted more, since he was coming in from the right.

Q. Just the—draw the approximate angle it was and in the street.

(Testimony of John L. DeRosa.)

A. Well, it would be tilted a little bit more so (indicating).

Q. You mean it would be heading a little bit more——

A. Yes.

Q. ——south?

A. Yes. The front end would be a little more south.

Q. A little more south; and you have indicated it there?

A. Yes.

Q. He hadn't yet straightened up yet and wasn't yet parallel with Howard Street. Now, I am talking about the Howard Street crossing, not Howard Street on the other side. [130]

A. He wasn't quite parallel with the crossing.

Q. Thank you. Sit down, then, Mr. DeRosa. Now, after he started up, he never came to a stop until he was hit, is that right? [130-A]

A. That's right.

Q. Did he slow down at any time?

A. No.

Q. Did he speed up at any time?

A. No.

Q. Did he just maintain his speed that he acquired after having started up, is that right?

A. Yes, sir.

Q. And can you estimate that speed for us?

A. Approximately five miles an hour he was traveling.

Q. Now, how long—you have estimated it, you said, you were not a good judge of time, so I think you said you thought he was stopped there about a

(Testimony of John L. DeRosa.)

minute, but is it fair to say this: That in any event, he was stopped the length of time that it took him to do the acts that you have described, namely, the wiping of the front windshield?

A. Well——

Q. Whatever the length of time that took?

A. A man as cautious as he was——

Mr. Phelps: Well, now, I will ask that go out and ask that the question be answered.

The Court: It will be stricken.

Mr. Phelps: Thank you, your Honor.

Q. Can you answer my question? I will re-frame it. My question is: You say that it is a little difficult for you to judge [131] time. I am trying to fix it for you another way and would you say——

A. It isn't difficult for me to judge time. I referred to distance.

Q. Oh, I see—after I believe. In any event, whatever that time takes to perform what he did, what you said, that is about the time he was stopped. Is that right?

A. I would say possibly he stopped there a minute.

Q. All right. A. Or so.

Q. And you came up right behind him as he stopped, did you? A. Yes.

Q. Had him under observation the entire time from the time you first saw him at the point D-1 until he did come to a stop? A. Yes.

Q. Now then, after he started out, what did your car do?

(Testimony of John L. DeRosa.)

A. Well, we parked just momentarily, and then started up following up behind him.

Q. You followed him around, followed him over the crossing, is that right? A. Yes.

Q. And did you thereafter come to a stop before the collision?

A. Yes, we came to a stop before the collision.

Q. And was that also at the bottom of the grade, or was it still a little farther up? [132]

A. We drove up on the grade a little ways.

Q. About how far up the grade?

A. Well, possibly a car length or so.

Q. What do you mean by a car length, an automobile length? A. That's right.

Q. About twelve or fifteen feet? A. Yes.

Q. Beyond and west of the place where he stopped? A. Yes.

Q. And then you came to a stop there, is that right? A. Yes.

Q. How long were you stopped there?

A. Well, due to the stress we was under, I couldn't say.

Q. All right. At any rate can you say this: In relation to the time of events, had you started up at the time when you first saw the headlight of the locomotive of the engine?

A. I believe that we were moving when I saw the headlight and heard the whistle.

Q. And how far had you proceeded from your stop, that is, your second stop, from the stop until you heard the whistle or saw the light?

(Testimony of John L. DeRosa.)

A. In reference to the second stop, what do you mean there?

Q. Well, as I understood it, you made a stop back here behind the Shanahan car and then went up a grade about twelve or fifteen feet and stopped again? [133] A. Yes.

Q. And then you had started up before you saw the train?

A. No, we saw the train before we stopped.

Q. You saw the train before you made the second stop?

A. Just—oh, maybe an instant or so before we stopped.

Q. I see. So then, so that we are clear, now you had stopped behind the Shanahan car, the position marked D-10? A. Yes.

Q. The Shanahan car started up and went over the crossing without stopping? A. Yes.

Q. And after it started up, you started up and started to cross the crossing and didn't stop again until you saw the train and that was what caused you to stop; is that right?

A. Well, I wasn't driving the car, and I don't remember exactly whether it was my saying something to my brother-in-law about the train or what it exactly was it made him stop.

Q. I see.

A. But he stopped there after I saw the train.

Q. Whether it was because you said something to your brother-in-law or because your brother-in-law saw the train, in any event, you didn't stop your

(Testimony of John L. DeRosa.)

automobile again until after you had seen the train?

A. After I had seen the train, yes.

Q. And you didn't do this: So that we are absolutely clear, [134] I don't want to be mistaken; you didn't then after having started up stop a second time back at the same point where the Shanahan car stopped and then proceeded on again and then come to a point, a third stop after you saw the train?

A. No, we made just the two stops on this side of the tracks.

Q. All right. And when you saw the train—how far did your automobile move after you saw it?

A. Well, I wouldn't exactly know just exactly.

Q. Well, give your best estimate, give it as close as you can and follow very frankly as close you think you can come to it?

A. It was just an instant.

Q. Was it a matter of feet, ten feet, or three or four feet, or only one foot? I know that you can't be exact, and I am not holding you down to that, but we want to know approximately how far?

A. I don't think that we went over half a dozen feet.

Q. All right.

A. After I saw the train until we stopped.

Q. And when you first saw the train—and that was the first thing you saw, was the headlight, is that correct? A. Yes.

Q. And as you saw that headlight, that was as

(Testimony of John L. DeRosa.)

you came, as it came into your view beyond the station, is that correct?

A. Well, I don't know if I would put it that far up the track, but as I said before, when I saw the train, I judge it was only a couple of hundred feet up the track and—when I saw the light. [135]

Q. When you saw it—I want to have it exactly—how far up the track was it? Now, I am trying to have your memory this way: You said you saw the light as it came into view as you drove up here and as the station then became more behind you and the locomotive then came in evidence when? Beside the station? Do you understand what I mean?

A. I understand what you mean, but I didn't pay any attention in reference to the depot.

Q. All right, so that you just can't answer that?

A. No.

Q. You can't help us on that? All right. At any rate, you did hear a whistle or horn?

A. Yes, I heard a whistle or horn, whatever they have.

Q. And was that almost at the same time that you saw the headlight?

A. Well, it was just momentarily after, just a short interval after I saw the light 'til I heard the whistle or horn.

Q. Was it a matter of a second or so?

A. Well, yes.

Q. And did it make a continuous whistle or was it a short blast, or what? A. Yes.

Q. What? A. Well, I don't know——

(Testimony of John L. DeRosa.)

Q. So far as you can now remember? [136]

A. Just one long blast as it went by.

Q. All right. Now then, so that your memory after you came to a stop ten or twelve, twelve or fifteen feet up the incline after the train was observed by you, did you remain stopped until after the train cleared the crossing? A. Yes.

Q. And at the time you stopped, how far ahead of you was the Shanahan car?

A. Well, I would say thirty-five feet.

Q. And at the time you stopped there, had there been an impact?

A. I don't exactly remember whether we stopped before the train hit or not.

Q. Can you tell me where the Shanahan car was when you first saw the headlight?

A. Well, I wasn't looking at the car when I saw the headlight. I was looking out the side of the side window and when I looked around the next time I saw the car as I saw the headlight, that is, it seemed to me like it was right over the main line right in front of the train.

Q. Was that before or after the collision?

A. That was before the collision.

Q. How far was the engine from the automobile at that time? A. Well, I couldn't say.

Q. And at that time, I take it from the very moment that you [137] saw the headlight up until after the accident and after the train cleared the crossing, your entire attention was occupied by

(Testimony of John L. DeRosa.)

the events of seeing this locomotive coming and watching the car?

A. Well, my whole attention was centered on the car. I didn't especially pay any attention to the train until it came into my line of vision directly in front of me.

Q. All right, so you were watching the car the entire time before you saw the train, and after you saw the train, you were watching the train and the car?

A. Yes.

Q. And you weren't watching anything else?

A. No.

Q. All right. Now, when you say that—did I understand you to say that you didn't think that the train was going to come to a stop?

A. Yes.

Q. Think back. Isn't it a fact that you actually remember seeing sparks fly from the wheels because the brakes were set on the train at the crossing?

A. I actually saw a spark, but I imagined it was from part of the wreckage under the car that was throwing the sparks.

Q. Didn't you see it was sparks from the brakes?

A. I couldn't say truthfully that they were the sparks from the brakes. I wondered at the time what they were from. [138]

Q. I see. Well, you have seen, haven't you, trains coming down grades and brakes set and sparks flying?

A. No, I haven't.

Q. You haven't? Well, is it your testimony then,

(Testimony of John L. DeRosa.)

that you would say that you did not observe sparks that were coming from the brakes of the cars?

A. Yes.

Mr. Murman: He has testified he has never seen sparks coming from brakes. That is a pure conclusion, if the Court please.

Q. (By Mr. Phelps): Now then, so far as you are concerned, you are not telling us anything other than what you heard or saw, isn't that correct?

A. That is right.

Q. You don't know of your own knowledge whether or not any further or other whistles were sounded by this locomotive other than the one that you heard, is that correct?

A. I never heard any.

Q. All right, and you are not telling us now, not meaning to say that no other whistles were sounded?

Mr. Murman: That is calling for a conclusion of the witness, if the Court please. How can he say whether another whistle was sounded if he only heard one whistle?

Mr. Phelps: I am qualifying it.

The Court: He already stated that. He said he never heard [139] any other.

Mr. Phelps: That is exactly what I am getting at.

Mr. Murman: That is the reason for my objection.

Mr. Phelps: I think I am entitled to go into that.

Mr. Murman: You are not entitled to ask the

(Testimony of John L. DeRosa.)

witness to answer a question he knows nothing about.

Mr. Phelps: Well, I submit my question.

The Court: I think the question was asked and answered. He said he only heard that one whistle.

Mr. Murman: I didn't think he had given any answer to that last question.

The Court: Well, read the question, Mr. Reporter.

(The question was read by the Reporter.)

The Court: You can answer that question.

A. Would you mind framing the question again?

Mr. Phelps: I think I can, yes. Don't answer until your Counsel has a chance to object.

Q. Mr. DeRosa, my question is simply this: You are telling us what you did see and what you did hear, and you are not now telling us by your testimony that the horn or whistle was not sounded on any other occasions than the one you heard?

Mr. Murman: I submit, if the Court please, if he only heard one whistle, how can he tell whether there was blowing on any other occasion?

The Court: He is not asking that. He is simply asking [140] if it was only once that he heard the whistle.

Mr. Murman: If that is the question, I have no objection to him answering.

A. It was only once I heard the whistle.

Q. (By Mr. Phelps): All right. How long did you stay at the scene of the accident?

(Testimony of John L. DeRosa.)

A. Well, I don't imagine we stayed there over six or seven minutes.

Q. This was after you drove up and crossed the crossing and went over as you have described it to us? A. Yes.

Q. Then later you came back, is that correct?

A. Yes.

Q. How long afterwards was it that you came back?

A. Well, I couldn't say about that. I never carry a watch.

Q. Half an hour, an hour, what?

A. I believe it was longer than that.

Q. Your best estimate?

A. We went to work and the Foreman told us we might as well go back home, we turned around, got in the car and drove back to the scene of the accident. I imagine it was an hour at the least.

Q. When you got back, had Mr. Shanahan been taken away in the ambulance? A. No. [141]

Q. He was still there? A. Yes.

Q. How long did you remain there on this second occasion?

A. Oh, we remained possibly ten minutes or so.

Q. By the time you left the second time, had Mr. Shanahan then been taken away? A. No.

Q. Had any preparations been made to start to take him away; in other words, had he been lifted on the stretcher and was he being lifted into the ambulance at that time?

A. Well, I believe there was some "diffewculty"

(Testimony of John L. DeRosa.)

about which funeral parlor was going to take care of him.

Q. I see, but nothing yet had been done about that? A. No.

Q. Were there any officers there that you saw?

A. There was a Highway Patrolman.

Q. And do you know who he is?

A. No, I don't know him.

Q. Can you describe him?

A. No, it has been too long ago.

Q. Was he in the uniform of a State Highway Patrolman? A. Yes.

Q. And was the Constable there, if you know?

A. I don't remember of seeing him, no.

Q. You don't remember seeing him? [142]

A. No.

Q. You didn't talk to him at the scene of the accident, the Constable? A. No.

Q. Do you know the name of the Constable?

A. You mean at Anderson?

Q. Yes.

A. I believe his name is Dewey Casebeer.

Q. You didn't have any conversation with him?

A. No.

Q. Now, on the question of visibility at the time of the accident, you said it was pretty dark, is that right?

A. Yes, it was dark enough that you needed your headlights pretty bad.

Q. And was day breaking?

(Testimony of John L. DeRosa.)

A. Well, as I remember, I don't know for sure. It might have just been, just barely breaking.

Q. The gray light of dawn, is that right?

A. Well, I don't know what you mean, how dense you mean.

Q. Well, I am not now concerned with atmospheric conditions, Mr. DeRosa, but I am trying to find out the best I can from you because you were there.

A. It was just breaking dawn.

Q. It was just breaking dawn? A. Yes.

Q. By that, so that I can understand, the sky wasn't black as it is at night. It had started to break dawn and there was light in the sky?

A. I don't remember whether there was light in the sky or not. I remember it was misty and I believe it was just breaking dawn.

Q. Breaking dawn?

A. I don't believe there was enough light to amount to anything from the dawn.

Q. Well, it was sufficient, so that you could see the silhouettes of buildings, couldn't you?

A. Well, I don't remember exactly whether I could or not.

Q. You don't remember? Could you see the silhouettes of trees?

A. You are referring to against the sky?

Q. Yes.

A. Well, I don't believe you could.

Q. It was overcast, wasn't it?

A. Yes.

Q. And had been raining that night?

(Testimony of John L. DeRosa.)

A. Well, I don't know. I don't remember whether it had been raining or not. It was a kind of misty morning. I guess you could call it small raindrops.

Q. But hadn't it been raining rather heavily that night?

A. I don't remember whether it had or not.

Q. You don't remember whether there were puddles of water [144] around this crossing?

A. No.

Q. I mean real puddles. Deep puddles. Not made from mist.

A. I don't exactly remember seeing any puddles, no.

Q. Do you remember whether the roads were wet from rain or not?

A. The roads were wet, yes.

Q. Do you know whether or not that was from the rain of the night or don't you know one way or the other, tell me?

A. Well, I assumed it was from the mist that was falling there in the morning. [145]

Q. But it could have been from the rain, is that right?

Mr. Murman: No, that is not the witness' testimony. You are trying to put words in his mouth.

Mr. Phelps: I am trying to get the witness to answer the question "Yes" or "No."

The Court: Don't argue about it. Proceed and answer the question. Read the question.

(The question was read by the reporter.)

(Testimony of John L. DeRosa.)

The Court: That is assuming it had been raining.

Mr. Phelps: Exactly.

A. Assuming that it had rained, it could have been from the rain.

Mr. Murman: That is a purely hypothetical answer, if the Court please, and I move it be stricken.

The Court: I don't think it makes any difference whether it rained or not. The witness has already said he doesn't know whether it rained or not.

Mr. Murman: I can't see the materiality of it, either.

The Court: If there had been a rain, then it might have been from the rain. That's like saying I would have had ham and eggs for breakfast if I had some eggs.

Mr. Phelps: I think, if Your Honor please, we can establish it did rain that night. We have pictures of puddles, and so on.

The Court: I don't care what you could establish now. [146] He may have been asleep.

Mr. Phelps: Absolutely.

The Court: I have been asleep while it rained.

Mr. Phelps: Unquestionably; but I thought it would be proper to question him about it and I still think it is. All right.

Q. (By Mr. Phelps): Now, then, can you tell us whether or not before you left the scene of the accident it got lighter or whether it remained just as dark as it was before?

A. Well, I believe it got just a little bit lighter.

(Testimony of John L. DeRosa.)

Q. And can you tell us whether or not the visibility before you left was such that you could see objects, see the automobile down the crossing, and so forth, from the crossing?

A. Well, I don't believe you could see it very well from the crossing.

Q. But you could see lights? A. Pardon?

Q. I say, you could see lights? This mist—let's get into this mist—it wasn't so thick like a fog that it obscured or blocked lights?

A. You could see lights, yes.

Q. It wasn't fog so that it obscured and blocked out lights?

A. It didn't block out lights at a relatively short distance, no.

Q. And it did not block out the lights across the road? [147] A. No.

Q. Didn't block out the headlights of the cars on Highway 99?

Mr. Murman: You mean at the crossing, Mr. Phelps?

Mr. Phelps: No. As he was coming down, he said there were cars going down Highway 99 and he could see the headlights.

Q. I take it the mist didn't prevent you from seeing—it didn't obscure them?

A. Well, I think possibly if you would look across there you could see headlights, yes.

Q. Is it your testimony that your windshield wiper was working on the outside at all times or was it just working some of the time?

(Testimony of John L. DeRosa.)

A. It was working at all times.

Q. So that the mist, steam, that you eliminated by the use of your hands, that was natural steam from the inside? A. Yes.

Q. The windows were rolled up? A. Yes.

Q. Was the radio playing or not?

A. I don't remember whether it was or wasn't.

Q. You don't remember one way or the other, is that right? A. No.

Q. Were you talking to your brother-in-law as you were approaching this crossing or not?

A. Well, we generally talked to each other all the way to work. [148]

Q. So that you were driving down Center Street, and as you approached the crossing and as you stopped, you were talking to your brother-in-law in the normal course?

A. In the normal course, yes.

Q. And your attention was directed to that, also?

A. Not entirely, no.

Q. In part? A. In part.

Mr. Phelps: I see it is after four, Your Honor. Does Your Honor——

The Court: You can't finish with this witness?

Mr. Phelps: No, I can't.

The Court: All right, we will now take a recess until tomorrow morning at ten o'clock, so all of you be here.

And I want to say, ladies and gentlemen of the jury, that this case will not go on on Friday. We will recess tomorrow at twelve and convene at one-

(Testimony of John L. DeRosa.)

thirty and recess again at three-thirty until next Tuesday.

Bear in mind, between now and tomorrow morning, the admonition I have heretofore given you.

(Thereupon, an adjournment was taken until 10:00 o'clock a.m., on Thursday, December 22, 1949.) [149]

December 22, 1949, 10:00

JOHN L. DeROSA

resumed the stand on behalf of the plaintiff.

The Clerk: Shanahan v. the Southern Pacific, for further trial.

Cross-Examination

(Continued)

By Mr. Phelps:

Q. Mr. DeRosa, referring back now to the time that you were on the Howard Street crossing, you were approaching the crossing and as you drove up to it and right down to the time of the impact, at any time did the visibility improve on the crossing?

A. Well, I couldn't say that it did.

Q. In other words, may I ask, did objects in and about the crossing at any time up until the impact become more apparent, more visible to you?

A. I couldn't say that they did.

Q. Did you see the beam of a headlight on the tracks?

(Testimony of John L. DeRosa.)

A. As you speak that, you speak of the shining on the tracks?

Q. Let me reframe my question so there will be no misunderstanding. As I understood your testimony, Mr. DeRosa, you saw a light itself on the locomotive at the point you have marked D-8?

A. Yes.

Q. And by that you meant the light as it sits on the locomotive? [150]

A. Yes.

Q. Light or lights. Now, then, of course, directed ahead of that light is a beam?

A. Yes, sir.

Q. Which projects itself out ahead and shines on down the track in the direction which the locomotive is headed?

A. Yes.

Q. Did you see that beam at any time prior to seeing the light itself?

A. Well, I believe I did see the beam of the light as I saw the light itself.

Q. All right. And that beam of that light, where did you see it?

A. Just in the—well, kind of hard for me to say. I believe, all I remember of seeing, the beam of the light was just a short distance from the light itself.

Q. And by a short distance, what do you mean?

A. Well, maybe—well, it would be hard to judge distance in feet—oh, I would say possibly or 50 feet.

Q. Just 40 or 50 feet ahead of the locomotive and on the track ahead of it, is that right?

A. I don't remember of it shining on the track; no, just the beam of the light in the air.

Q. In the air?

(Testimony of John L. DeRosa.)

A. Is all I remember of seeing. [151]

Q. About how far off the ground or tracks?

A. Well,——

Q. At that point of 40 or 50 feet?

Mr. Murman: From the headlight?

Mr. Phelps: From the headlight.

A. Oh, it seemed to me it would be probably three or four feet clear of the tracks.

Q. And did you see that beam as you described it, three or four feet above the tracks, 40 or 50 feet ahead of the locomotive, did you see that before or after you saw the locomotive headlight itself?

A. I saw it at approximately the same time.

Q. Do you have any recollection, Mr. DeRosa, of seeing the objects in and about the crossing being lighted up by the headlights before that which you have just described?

A. No, have no recollection of it.

Q. Then was it so dark that it was necessary for your own headlights to be used to show up objects ahead of you?

A. Yes, sir.

Q. It was that dark. All right. Now, having in mind that you say that it was that dark, and directing your attention once again, I ask you at any time when you were looking at this crossing before the accident, did you ever see the scene of the accident lit up by the headlight of the locomotive before the time you just described at only 40 or 50 feet ahead of the [152] locomotive which was then 200 feet away?

(Testimony of John L. DeRosa.)

Mr. Murman: Objected to as having been asked and answered.

The Court: This is cross-examination. You may ask a question more than once. Proceed and answer the question, if you understand it.

Q. (By Mr. Phelps): Do you understand my question? A. Not clearly.

Q. Then I will reframe it. Directing your attention, Mr. DeRosa, to the fact that you have said that your headlights were necessary on your own automobile to show up objects ahead, it was that dark, you say? A. Yes, sir.

Q. Now, directing your attention to that, and now asking you if at any time as you saw that crossing before the accident, you saw the objects in and around the crossing illuminated or lit up by the headlights of the locomotive?

A. As you're referring, is that prior to the collision?

Q. Yes. A. I did not.

Q. You did not. You did not see then the car itself lit up by the locomotive, is that right?

A. I saw——

Q. The headlight.

A. I saw the reflection of the headlight although very little on the car, as I remember. After I turned my attention from [153] the locomotive's light to the car.

Q. Now, I don't understand your answer.

Mr. Murman: I submit that is a clear answer, if the Court please.

(Testimony of John L. DeRosa.)

Mr. Phelps: It may be clear to you.

Mr. Murman: If counsel doesn't understand it, that is his fault, not the witness's.

Mr. Phelps: I was about to apologize to the witness that it was my fault, Your Honor.

The Court: Have the answer read again.

(Answer read.)

Q. (By Mr. Phelps): If I understand, then, you didn't see the reflection of the headlights on the car before you saw the lights of the locomotive, and then after that you just saw it very little, is that right? A. Yes.

Q. And before you saw this, did you ever see such objects as the telephone phones and the battery box and so forth, those objects around the crossing, lit up by the headlights?

Mr. Murman: That is before he saw the headlight?

Mr. Phelps: Yes.

A. No, I never.

Q. And at any time did you see those objects lit up by the headlights?

A. I can't remember of saying that I did. [154]

Q. Now, then, you have testified two trains, one on the passing track, one on the main line, which was the train involved in the accident; did you see any other trains around there at the time of the accident? A. No, I never.

Q. Did you see any other cars or equipment around there?

(Testimony of John L. DeRosa.)

Mr. Murman: Railroad cars?

Mr. Phelps: Railroad cars around there.

A. No, I don't remember seeing any other cars or equipment.

Q. So that there is nothing to obstruct the view of a person on the Howard Street crossing other than the depot itself?

A. I don't remember seeing anything else.

Q. I see. Now, then, may I ask you, Mr. DeRosa, if on this question of a wigwag it isn't true that—the fact is that although you did not see the wigwag in operation, the fact is that you don't know whether the wigwag was operating or whether it wasn't operating.

Mr. Murman: Your Honor, I object to that as calling for the conclusion of a witness on a purely hypothetical state of facts. All he can testify to is, Your Honor, is what he saw, can't assume that the wigwag was working if he didn't see it working.

The Court: No need for argument. I will allow the question. He is just asking if he saw it working, that is all.

Mr. Murman: If that is the question, I have no objection [155] to it.

A. I did not see the wigwag working.

Q. And you did not know whether it was working or not?

Mr. Murman: That is the same thing. Your Honor, he can only testify to what he saw, can't testify whether it was working or not.

The Court: I will allow the question. Do you know whether or not it was working?

(Testimony of John L. DeRosa.)

A. As my memory serves me, I can't remember of seeing it working, no.

Q. So that answer would mean, of course, you don't know whether it was working or not, isn't that fair to say?

A. Precisely.

Q. Yes.

Mr. Phelps: I have no other questions, Your Honor.

Mr. Murman: No further questions.

Mr. Phelps: As to the witness Mr. Hughes, if Your Honor please, I find I will not need to address any more questions to him, and he may be excused and so may this witness.

Mr. Murman: Then both Mr. DeRosa and Mr. Hughes may be excused, is that right?

Mr. Phelps: Yes.

Mr. Murman: Will you call Mr. Casebeer, please? While we are waiting, if the Court please, I have here a [156] document which I have shown to counsel which constitutes a communication from the Collector of Internal Revenue to Mr. Shanahan prior to his death which shows the amount of his earnings to the date of death, and I understand from counsel he has no objection to the document being introduced in evidence for that purpose.

Mr. Phelps: No, and I will stipulate that those figures are correct, whatever that figure is. You may enter into that stipulation, if you want.

Mr. Murman: I think we will just put this in evidence and in case there is any need to refer to it, we will have it marked.

(Testimony of John L. DeRosa.)

The Court: Stipulate that the document produced from the Internal Revenue will go into evidence.

Mr. Phelps: Yes, sir, Your Honor, but my understanding is, Mr. Murman, that that is the gross earnings before deduction of income tax.

Mr. Murman: That is the gross pay that Mr. Shanahan received as of the date of death, per annum.

Mr. Phelps: Rate of gross pay per annum.

Mr. Murman: That's correct.

DEWEY CASEBEER

called as a witness on behalf of the plaintiff; sworn.

The Clerk: Will you state your name to the Court [157] and jury, please?

A. Dewey Casebeer.

The Clerk: Statement of earnings is marked Plaintiff's 8 in evidence.

(Thereupon the statement of earnings was received in evidence and marked Plaintiff's Exhibit No. 8.)

Direct Examination

By Mr. Murman:

Q. Mr. Casebeer, you appear here pursuant to a subpoena issued by the plaintiff, are you?

A. I am.

Q. Where do you reside?

A. Anderson, Shasta County, California.

(Testimony of Dewey Casebeer.)

Q. And what is your business?

A. I am deputy sheriff, Shasta County, constable Township No. 5, Anderson, California.

Q. How long have you been acting in that capacity?

A. It will be 15 years on the 5th day of January in 1950.

Q. 1950? A. 1950.

Q. Now, did you know Mr. Shanahan before his death? A. I did.

Q. How long had you known him?

A. I met Mr. Shanahan before World War I.

Q. And where did you meet him?

A. Anderson. [158]

Q. Was he living in and about Anderson at that time? A. He was.

Q. Do you know what he was doing at that time?

A. Well, his folks had a ranch, prune trees, raised fruit.

Q. In other words, he was born and raised in that vicinity, is that correct?

A. I wouldn't say he was born there, I don't know just where he was born.

Q. Did you know that at the time of his death he was employed by the Bureau of Internal Revenue? A. I did.

Q. Prior to that employment, had he worked in the vicinity of Anderson? A. Yes.

Q. Do you know the nature of his work prior to that?

A. Well, before he worked for the Federal Gov-

(Testimony of Dewey Casebeer.)

ernment he was—he worked at the Irrigation Office there at Anderson, and also clerk in the Sheriff's office in Redding, Shasta County.

Q. Do you know whether or not he was ever justice of the peace up there? A. Yes.

Q. He was, is that right

A. Yes, he was.

Q. Now, a part of your work is that of enforcing traffic laws, is that correct? [159]

A. In the town of Anderson, just on the streets.

Q. You said you knew Mr. Shanahan before the first World War. What year was it before the first World War? A. Well, around 1916.

Q. Now, do you know whether or not from the time that you knew him in 1916 up to the time of his death, he drove an automobile during those years? A. Yes, he had.

Q. All during those years? A. Yes.

Q. And had you observed him driving on occasions?

A. I have a good deal since I have worked for Shasta County.

Q. Have you actually ridden with him as a passenger? A. No.

Q. But you have seen him driving?

A. Yes.

Q. And where have you seen him driving?

A. Well, I have met him many times on the highway and I saw him just ever so many times driving the streets of Anderson.

(Testimony of Dewey Casebeer.)

Q. Prior to his death, did you ever see him cross the track at Howard Street crossing?

Mr. Phelps: Objected to as incompetent, irrelevant and immaterial.

The Court: It is preliminary, I think.

Mr. Murman: That is correct. [160]

A. Yes, I have.

Q. About how many times, would you say?

A. Oh, be hard to say. I have met him, in fact I have met him on the other crossings also. I have met him at the Howard Street and Ferry Street crossing and when he was working in Redding, he would cross at the North Street crossing in Anderson.

Q. You have actually seen him go over all of those different crossings? A. Yes, I have.

Q. Calling your attention to the Howard Street crossing in the period of time that he was employed by the Bureau of Internal Revenue, about how often on the average, oh, say, a week as an interval, would you see him go across there?

A. Oh, I would say a couple of times a week; maybe more.

Q. Maybe more. At least a couple of times?

A. Yes.

Q. And when did you last see him go over that crossing that you can recall; approximately? Maybe I should ask this question first: Do you know when he was killed? A. Yes, sir.

Q. When was it? A. December 27.

Q. What year? A. 1948. [161]

(Testimony of Dewey Casebeer.)

Q. That would be about a year ago?

A. About a year ago.

Q. Now, prior to his death, when did you last see him go over the Howard Street crossing?

A. Well, I wouldn't know.

Q. I don't mean as to a particular day, but as to an interval of time, a week, a month, a few days, or what? A. I would say within a week, yes.

Q. Within a week.

A. Within a week.

Q. And prior to that time you said you had seen him go over there about twice a week on the average? A. Yes.

Q. No less than that? A. No.

Q. Now, in going over that crossing as you saw him, did he go from east to west or from west to east?

A. Well, I saw him go from the west to the east in the evening; I saw him in the morning go from the east to the west.

Q. Did you have an office or some place of business right near that crossing? A. No.

Q. Did you have a station that you occupied at times near the crossing?

A. I had a Standard credit card and the only Standard station [162] in town was right opposite that crossing and I bought most of my gas there for many years.

Q. And it was on those occasions you saw him, is that correct? A. Yes.

Q. Now, will you tell us what his course of con-

(Testimony of Dewey Casebeer.)

duct was on these various occasions as he went over those crossings?

Mr. Phelps: That is objected to as incompetent, irrelevant and immaterial, without foundation, not bearing on any of the issues of this case, and invading the province of the jury as to his conduct on other occasions; without foundation; no showing the circumstances were the same, no train bearing down on him, and so forth; incompetent, irrelevant and immaterial.

Mr. Murman: If the Court please, I think it is competent on the defense which has been made, namely, that Mr. Shanahan was negligent in crossing that crossing; that is an allegation in the answer of the defendant, and it is true as to that allegation that this testimony is directed. The issue is whether or not he used ordinary care and it is to that issue that this testimony is directed and I think it is quite competent to show a course of conduct which existed over a period of years prior to the accident and to the death of the individual who has been killed, partly where the issue is, where it is in this case.

The Court: Well, I am inclined to feel it isn't competent.

Mr. Murman: I will bow to the Court's ruling.

The Court: If you can show me some authority to the contrary, [163] I will, during the recess or during the noon recess, I will then change my mind, but I feel now that what a man may have done on one occasion is not competent to show what he

(Testimony of Dewey Casebeer.)

did on another occasion. In other words, it hasn't a bearing one way or the other.

Mr. Murman: I would agree with Your Honor except for the fact I understood the testimony over a period of many years he observed Mr. Shanahan go over this crossing at least twice a week, and it is not one instance, but it is a series of instances, which constitutes the course of conduct. It is my understanding that where that comes prior to the accident, things that happened subsequent to the accident are not admissible, but things happening prior to the accident in connection with a person's conduct or the operation of vehicles or various instrumentalities can be shown as some evidence of whether or not there was negligence at the time of the accident.

It is not—it is merely a circumstance, I concede, but it does bear on the issues and its does for admissibility, for what weight the jury wishes to attribute to it. In other words, the question is here of weight, not the admissibility, as I understand the rule.

Mr. Phelps: If your Honor please, it only takes one mistake to make a tragedy. It doesn't make any difference what a person has done in the past. The question here is what happened on this occasion and the conduct on that occasion. [164] Certainly no showing, in any event, that the circumstances were substantially similar.

The Court: I will sustain the objection at the present time and if you can produce for me any authority to support your position, Mr. Murman,

(Testimony of Dewey Casebeer.)

I will then allow the evidence in, if you find out today.

Q. (By Mr. Murman): Now, Mr. Casebeer, at the time that Mr. Shanahan was killed, I understood that you had seen him about a week before, that on the last occasion, is that what your testimony was?

A. Yes.

Q. Would you say at that time he was in apparent good health? A. Yes.

Q. And you have any state of mind as to his age?

Mr. Phelps: Can't we establish that exactly by the death certificate, or is there a difficulty there?

Mr. Murman: No, I don't think there is any difficulty, but as to the man's appearance.

Mr. Phelps: I am sorry; go ahead. I thought that I could stipulate and help you, but go ahead.

Q. (By Mr. Murman): About what would his age appear to you to be?

A. A man in his early 50's.

Q. Do you know anything about his personal habits? A. Just other than fishing is all.

Q. A good fisherman?

A. On weekends. [165]

Q. Do you know whether he had temperate habits or not? A. No, he did not.

Q. You say he did not have temperate habits?

A. I don't quite get you on the question.

Q. In other words, was he a sober man?

A. Oh, yes.

Q. Except when fishing, maybe?

A. No, no, when fishing, too.

(Testimony of Dewey Casebeer.)

Mr. Murman: You of course knew Mrs. Shanahan, his widow? Did you know her prior to his death? A. Yes.

Q. Do you know how long they were married prior to his death?

A. Oh, I would say six or seven years.

Q. At least that amount? A. Yes.

Q. Now, prior to the collision did you observe the time normally when the Beaver train No. 13 would come through Anderson?

Mr. Phelps: I object to that, incompetent, irrelevant and immaterial what time it came through.

The Court: Is that the name of the train involved in this case?

Mr. Murman: Yes, it is called the Beaver, train No. 13.

The Court: I will allow it.

A. Oh, between 7:20 and 8:00 o'clock. [166]

Q. (By Mr. Murman): In the morning?

A. Yes.

Q. In other words, it varied between those times, is that correct? A. Yes, it has.

Q. Was it more often through Anderson around 7:20 than 8:00 o'clock?

Mr. Phelps: Objected to as asked and answered, and leading and suggestive.

A. Well,—

The Court: I will allow it.

A. —I would say it come from 7:30, later.

Q. 7:30 later? A. Yes, 7:30 and later.

Q. By that you mean it more often came through Anderson around 7:30?

(Testimony of Dewey Casebeer.)

A. To my knowledge, yes.

Mr. Phelps: I object to that as leading and suggestive. It wasn't what he said before, and I ask the answer go out.

Mr. Murman: I was doing what you did a little while ago, trying to clear up my own understanding, and I will do the same as you did, apologize for not getting a clear answer.

Mr. Phelps: All right. I move to strike the answer, your Honor.

The Court: Oh, I don't know. I don't think it makes [167] any difference.

Q. (By Mr. Murman): You recall the morning of December 27, 1948, do you? A. I do.

Q. Where were you prior to 8:00 o'clock on that morning? A. Home.

Q. Where was your home?

A. Four blocks on South Street. It was west on South Street.

Q. What place? A. Anderson.

Q. South Street is further south than the three streets we have here on the map, isn't that correct?

A. Yes, it is.

Q. Is it the next street south of Howard Street?

A. Yes.

Q. What, if anything, occurred that morning around about 8:00 o'clock?

A. One of the members of the Southern Pacific, the agent, called me and said a train had hit an automobile and I said, "I will be right down," and hung up and went to get my coat, and the phone rang again and I picked up the phone and it was

(Testimony of Dewey Casebeer.)

Mr. Jeff, Jeff's Machine Shop, called me and said, "Dewey, Ellis Shanahan just got killed. Come right down."

Q. Do you go to the crossing?

A. I went right down. [168]

Q. When you got there did you see Mr. Shanahan's body? A. I did.

Q. Now where was it, as you recall?

A. Well, it was down below the crossing on the west side of the track, around, I would say, 15, 16 feet from the rail.

Q. When you say below the crossing, you mean below which crossing?

A. It would be south of Howard Street crossing.

Q. South of the Howard Street crossing?

A. Yes.

Q. Did you make any attempt to examine the body to ascertain whether Mr. Shanahan was alive or not? A. I did.

Q. What did you do?

A. My own knowledge, I saw that he was dead and I went back to my car and got a blanket to cover him up.

Q. You didn't see him breathing, is that right?

A. No.

Q. Did you see that automobile that was involved in the collision? A. Yes.

Q. Where was that?

A. Well, it was just a little past his body and a little more south. It was further south off of the main line of the side track that was there. [169]

Q. I show you plaintiff's exhibit No. 7, in evi-

(Testimony of Dewey Casebeer.)

dence, and ask you to tell me whether or not that is a picture of the wrecked car as you saw it?

A. Yes, that is it.

Q. Where was the train, or did you see the train at that time? A. I saw the back end of it.

Q. Was it beyond where the car had come to rest? A. Yes.

Q. About how much beyond, have you any idea?

A. Well, judging from the distance looking at the back end of it, I never went down there, I would say a quarter of a mile.

Q. The back end of the train was about a quarter of a mile beyond where the car had come to rest?

A. Yes.

Q. Did you take any notice of the number of cars on the train? A. No, I did not.

Q. Have you any idea at all as to the approximate number? A. Of cars?

Q. Yes. A. No.

Q. There was more than one car on the train, was there not?

A. Well, I could just see the back end.

Q. I see.

A. I was standing right in the track.

Q. When did you get there, approximately? [170]

A. Oh, right around 8:00 o'clock, as near as I could call the time, offhand. I never checked any clock or anything when I was called.

Q. How was the weather that morning?

A. Misty.

Q. Misty? A. Yes.

(Testimony of Dewey Casebeer.)

Q. When you say misty, do you mean that you could see mist in the air?

A. Yes. We call it "wet fog" up there in our country.

Q. Would you call it tule fog?

A. I don't know what tule fog is.

Q. It was too far north for tule fog? How about the daylight? What stage of light was there from morning dawn, could you tell?

A. Well, other than the mist at that time, why, it was clear enough. I didn't have to have lights on the car.

Q. You didn't have to have the lights on your car? A. No.

Q. That is, as you left your home about 8:00 o'clock and drove down there, you didn't use lights, is that right?

A. And as you looked down the track from where the automobile was to the end of the train, could you see the end of the train clearly or just see the lights on the end of the train?

A. I could see red lights. I believe they had a flare up [171] down there.

Q. What they call a fusee? A. Yes.

Q. Did you see any train crew?

A. Yes, I did.

Q. Did you talk to any of them?

A. No, never.

Q. When you got the crossing of Howard Street, the Howard Street crossing, did you see any flagman at the crossing?

Mr. Phelps: Just to be consistent, may it please

(Testimony of Dewey Casebeer.)

the court, I will make the objection. I know your Honor's ruling. This one added, it has no bearing after the train had crossed.

The Court: Overruled; he may answer.

A. No, I didn't.

Q. By the way, are you familiar with the length of time that this depot has been at the place where it was located on the morning of the collision?

A. It has been there a long time.

Q. Long time? A. Yes.

Q. In other words, it isn't a new building?

A. No, it isn't.

Q. Were you familiar with the wig-wag signal on the west side of Howard Street crossing?

A. Yes. [172]

Q. How long had that been there?

Mr. Phelps: I object to that.

A. A number of years.

Mr. Phelps: As long as it was there at the time, its origin I don't think makes any difference.

Mr. Murman: There is some obligation on the part of the railroad, where they put up a signal, that people can rely on it, Mr. Phelps.

Mr. Phelps: I realize that.

The Court: At any rate, it is answered. He said it had been there a number of years.

Mr. Murman: Oh, I didn't hear the answer, I am sorry. I thought the objection was being considered.

Q. Now, Mr. Casebeer, we placed in evidence here some photographs, plaintiff's exhibits 3, 4, 5

(Testimony of Dewey Casebeer.)

and 6. Were you present when those photographs were taken? A. I was.

Q. Do you know about when those photographs were taken?

A. Either the 30th or 31st day of December.

Q. Of the same year as the accident?

A. Yes, '48.

Q. Was that also true of the photograph of the wrecked car, plaintiff's exhibit 7? A. It was.

Q. Taken on the same day? [173]

A. Yes.

Mr. Murman: You may cross-examine.

Cross-Examination

By Mr. Phelps:

Q. Mr. Casebeer, you are the constable, are you?

A. Yes, sir.

Q. That is a county——

A. Constable of Township 5 in Anderson and deputy sheriff of Shasta County.

Q. So that Anderson is not an incorporated city?

A. No, it is not.

Q. It is one of the unincorporated towns——

A. Yes.

Q. ——on the side of the road. Do you know what the population of it is?

Mr. Murman: That is as of the date of the accident, Mr. Phelps?

Mr. Phelps: As of the date of the accident.

Q. If you can, approximately.

(Testimony of Dewey Casebeer.)

A. No, I don't have any account of the population there due to the three mills that went in there, and we had built up so that I have no idea.

Q. You say you were present when these pictures were taken that were introduced in evidence, that you have just identified? A. Yes, I was. [174]

Q. Who actually took them, you or somebody else?

A. Charley Brown, the photographer for the insurance office.

Q. So he would be the one who would know exactly where they were taken and at what point and what they show, I take it?

A. He would be one of them, yes.

Q. I take it he made measurements?

A. What?

Q. I take it he made measurements to record where he had taken them from, if you know?

A. It is possible he did.

Q. But you didn't? A. No.

Mr. Phelps: I have no further questions.

Mr. Murman: That is all, Mr. Casebeer. Thank you very much.

The Court: Could you conveniently wait here until this afternoon? A. Yes.

The Court: I have in mind the question that you asked, Mr. Murman.

Mr. Murman: Yes, your Honor.

The Court: The fact that I sustained the objection. I am having the law run down on it now and

(Testimony of Dewey Casebeer.)

I would like to have the constable stay on if he would.

Mr. Murman: I will endeavor to, during the recess, your [175] Honor, see if I could contact the office and have those authorities gotten together for you.

The Court: Would you kindly wait around?

A. I can't get out until 7:00 o'clock this evening, anyhow.

The Court: All right.

(Witness excused.)

Mr. Murman: Before I call Mrs. Shanahan, your Honor, I would like to read to the jury that part of this document, which is plaintiff's exhibit 8, which bears on the matter that I introduced it in evidence for.

Ladies and gentlemen, this document is dated November 9, 1948. It is on the letterhead of the Treasury Department, Internal Revenue Service, addressed to Mr. Ellis E. Shanahan, Internal Revenue Service, Red Bluff, California.

"My dear Mr. Shanahan:

"It gives me great pleasure to advise you that your promotion to grade CAF-8, \$4103.40 per annum, was effective October 3, 1948. Standard form 50 attached.

"Yours very truly,

"JAMES M. SMYTH,

"Collector."

Then form 50 is attached, and on that form 50 it shows Mr. Shanahan's name, his date of birth, December 1, 1893; and the effective date of the promotion, October 3, 1948; the fact that he has civil service standing in the twelfth [176] Civil Service Region at San Francisco; that his position is that of zone deputy collector; that his service grade and salary is CAF-8 (716-047), and at \$4103.40 p.a., which I understand is per annum; and that shows the approval by the Collector of Internal Revenue from Washington, and again Mr. Smyth's signature appears as the signature of the authenticator, Collector of Internal Revenue.

Mrs. Shanahan, will you take the stand, please?

NELDA SHANAHAN

plaintiff herein, called on her own behalf, sworn.

The Clerk: Will you state your name to the court and jury, please?

A. Nelda Shanahan.

Direct Examination

By Mr. Murman:

Q. Mrs. Shanahan, you are the plaintiff in this action, are you? A. I am.

Q. And where do you now reside?

A. Anderson, California.

Q. Also, was that your home a year ago?

A. Yes.

Q. How long had you lived in Anderson?

(Testimony of Nelda Shanahan.)

A. Since about 1923.

Q. Are you the widow of Ellis E. Shanahan?

A. I am.

Q. When were you married to Mr. Shanahan?

A. On June 16, 1938.

Q. A little more than ten years prior to his death, is that right? A. Yes.

Q. Did you and he live together after your marriage up until the time of his death?

A. We did.

Q. As man and wife? A. Yes, sir.

Q. Now, what was Mr. Shanahan's age at the time of his death?

A. He was 55 on the 1st day of December.

Q. Was he in apparent good health?

A. He was.

Q. Was he supporting you at the time of his death? A. Yes.

Q. Had he been supporting you right along?

A. Yes, sir.

Q. You were dependent upon him, were you, for your support? A. I was.

Q. What was your age at the time of his death?

A. 43.

Q. So far as you know you were in good health then and are now, is that correct? [178]

A. Yes.

Q. Since his death have you remarried?

A. No, sir.

Q. You are his widow, are you, at this time?

A. Yes, sir.

(Testimony of Nelda Shanahan.)

Q. Did you have any children by Mr. Shanahan?

A. No, sir.

Q. You are his sole heir, is that correct?

A. Yes, sir.

Q. You knew of Mr. Shanahan's employment, did you not? A. I did.

Q. You just heard me read plaintiff's exhibit 8 to the jury. Is that a correct statement of his employment, and earnings, so far as you know?

A. So far as I know.

Q. And those earnings that he received as set forth in this statement, those were gross earnings, is that correct? A. Yes.

Q. Taxes were taken from that amount of earnings, is that correct?

A. Taxes and for the pension fund.

Q. Have you subsequently received the pension fund?

A. I received a portion of what he had paid in, but I have received no pension.

Q. You have received no pension, but you did receive a part [179] that was deducted from his salary, that he paid in? A. That is right.

Q. So that amount that I read, \$4103.40, was only diminished by taxes, is that correct?

A. That is right.

Q. Now, do you have any personal knowledge of the accident at all?

A. I have none whatsoever.

Q. Where were you when the accident occurred?

A. I was at home. It was right after the holi-

(Testimony of Nelda Shanahan.)

days and I had remained in bed that morning and knew nothing about it until my folks came to tell me.

Q. When did you last see Mr. Shanahan before he was killed?

A. Well, I couldn't tell you the exact hour. I remember when he came to leave for work to tell me goodbye, but I didn't look at the clock.

Q. You mean on the morning that he was killed?

A. Yes, sir.

Q. He came to you and kissed you goodbye, did he?

A. That is right.

Q. Did you know his destination at the time?

A. Yes, sir.

Q. And was it Redding?

A. He was going to Redding before he went to his office in Red Bluff. [180]

Q. He had a superior officer in Redding?

A. He did.

Q. Mr. Smith? A. C. Fred Smith, yes.

Q. Did you ever see him again after he kissed you goodbye that morning?

A. No, sir.

Q. Now, did you take charge of his funeral?

A. I did.

Q. Was there expense incurred in connection with the funeral?

A. Well, the funeral bill that I paid.

Mr. Phelps: Can you tell me what it is, counsel, and I will stipulate to it.

Mr. Murman: Yes. I have here the bill which shows the total amount paid was \$317.44.

Mr. Phelps: So stipulated.

(Testimony of Nelda Shanahan.)

Mr. Murman: That was a reasonable value of those services, was it?

Mr. Phelps: I will stipulate to that, too.

Mr. Murman: Then it won't be necessary to put this in evidence, your Honor.

Q. Were there any other expenses that you paid in connection with Mr. Shanahan's death?

A. Yes, there was a towing bill that I paid to remove the car from the wreck to the garage of \$6.50. [181]

Q. You paid that?

A. My brother-in-law paid it and then I paid him.

Q. Eventually you paid it?

A. Yes, I paid it.

Q. You believe that is a reasonable amount for the work done?

Mr. Phelps: We will stipulate to that. We make no point of that. Are there any other services, any expenses?

Mr. Murman: I don't think of any.

A. I do think of one. I paid Dr. Thomas \$10.00 to be with the body when they examined it afterwards. I asked that Dr. Thomas be there and the coroner kindly consented.

Mr. Murman: You mean at the autopsy?

A. Well, when they took him to Redding.

Mr. Phelps: We will enter into a stipulation as to that charge, too, Mr. Murman.

Mr. Murman: Thank you. I have no further questions at this time of Mrs. Shanahan.

(Testimony of Nelda Shanahan.)

Cross-Examination

By Mr. Phelps:

Q. Mrs. Shanahan, just one or two questions. Do you know what Mr. Shanahan's take-home pay was, that is, what his check was after deductions of withholding taxes?

A. I wouldn't just be certain, but around \$700.00 and—I don't know whether it was \$722.00 or \$722.01. That would have been every two weeks.

Q. I see. [122]

A. They paid on an every two weeks' basis.

Q. I think I missed it and I would like to ask you, how long were you married to Mr. Shanahan?

A. Since June 16, 1934.

Q. Before that, Mrs. Shanahan, had you had any experience working?

A. I have worked all my life up and until after he and I were married and then I worked until 1944, and then I didn't work from 1944 until after Mr. Shanahan was killed.

Q. What I mean by working, I mean employed some place.

A. Yes, sir.

Q. What was the general nature of your work, clerical work?

A. Yes, office work. Secretary.

Q. Secretary? So you do do that type of work?

A. Yes.

Q. Are you now employed? A. Yes, sir.

Q. You are employed as a secretary?

A. Yes, sir.

(Testimony of Nelda Shanahan.)

Q. At Anderson——

A. Cottonwood Irrigation District.

Mr. Phelps: Thank you very much, Mrs. Shanahan.

Redirect Examination

By Mr. Murman:

Q. Mrs. Shanahan, the sum of \$132.00 or \$135.00 bi-weekly, are you sure of that? [183]

A. No, I am not, Mr. Murman.

Q. If you divide that figure up by 12 it is somewhere around \$320.00 a month.

A. It was 26 payments a year. I don't know just how.

Q. Could you be estimating that pay based on a previous pay status? A. It could have been.

Q. After all, this promotion he got was only about two months before he was killed.

A. That is right. It could have been more. I don't just recall.

Mr. Murman: I have no further questions.

Mr. Phelps: Have you any way of establishing the exact amount by income tax returns or otherwise?

A. I don't, but I am sure that is all in Mr. Smith's office.

Mr. Phelps: But you don't know? A. No.

Mr. Phelps: Thank you very much, Mrs. Shanahan.

Mr. Murman: I have no further questions.

Mr. Phelps: I have none.

(Witness excused.)

Mr. Murman: I have a few additional matters here, if the Court please. First, I have already shown this to counsel, I have an authenticated copy of the certified copy of the death certificate, and I ask at this time that that be admitted [184] into evidence as plaintiff's exhibit next in order.

Mr. Phelps: No objection.

(The death certificate was thereupon marked Plaintiff's Exhibit No. 9 in evidence.)

Mr. Murman: At this time I ask leave to read the death certificate to the jury.

Ladies and gentlemen of the jury, this death certificate reads as follows:

"Full name, Ellis Ellsworth Shanahan; district No. 4551, Registrar's No. 155. Place of death, Shasta County. City or town of Anderson. If outside city or town limits, write rural. Name of hospital or institution: Howard Street and Southern Pacific Railroad crossing. In this community, life; in California, life; in the United States of America, life. Veteran of World War I. Social security number, none. Sex, male. Color or race, white. Single, married, widowed, or divorced, married. Name of husband or wife, Nelda Shanahan. Age of husband or wife if alive, 43 years. Birth date of deceased, December 1, 1893. Age, 55 years and 26 days. Birth place, Anderson, California. Usual occupation, deputy collector of internal revenue, Treasury Department. Father's name, Ross Shanahan. Birthplace,

Colusa County, California. Mother's [185] name, Sarah Jane Winsell. Birthplace, Ball Ferry, Shasta County, California. Informant, Mrs. Nelda Shanahan. Address, P. O. Box 103, Anderson, California. Burial: Date, December 29, 1948. Place, Anderson Masonic Cemetery. Embalmer's signature, Rudy V. Balma, license No. 3533; funeral director, McDonald's Chapel, address, Redding, California, by Glen R. Linn. Date filed, December 29, 1948. Winona V. Simmons, registrar's signature.

Usual residence of deceased, California, Shasta County, town of Anderson, 1018 Ferry Street. Date of death, December 27, 1948, 7:45 a.m."

There is no medical certificate, but there is a coroner's certificate:

"I hereby certify that I held an investigation on the remains of the deceased and find from such action that deceased came to his death on the date and hour stated above. Immediate cause of death: Violent traumatic injury to skull (extensive lacerations left parietal-temporal and frontal cheek); immediate; due to possible skull fracture, crushing injury (multiple fractures) both right and left chest; multiple contusions and abrasions on face, upper and lower extremities. Julius M. Kehoe, M. D.

"If death was due to external causes, fill in [186] the following: Due to accident, December 27, 1948, at Anderson, Shasta, California. If injury occurred in or about home, on farm, in industrial place, or in public place?" That is filled in, "Public place." "Means of injury, hit by railroad train. Coroner's

signature, Claude E. Whiteman, coroner, Redding, California, December 27, 1948.”

Mr. Murman: Pursuant to a motion, your Honor, filed in connection with the rules regarding discovery, there was introduced and furnished to the plaintiff the following which I think under the rule is therefore admissible under evidence.

Mr. Phelps: I would like to see it, if I may.

Mr. Murman: These were produced by you.

Mr. Phelps: I haven't seen them. Anything else you want, Mr. Murman; as you know, I wasn't in the earlier stages of this case. I never saw this before, it may be that we could stipulate it may go, I think we probably can. But I would like to look at those a little bit—it is approaching the recess anyway—because otherwise I don't think this would be the proper way to prove it. Of course, it is only produced for inspection.

Mr. Murman: No, it was furnished to me as the records of the Southern Pacific.

Mr. Phelps: May I look at it?

The Court: Suppose we take a recess now, a ten-minute [187] recess now, gentlemen, and you can look at it during the recess.

We will take a recess now. I would like to have both of you come into my chambers after the jury leaves for just a second.

Ladies and gentlemen, we are taking the usual recess. During the recess will you bear in mind the admonition I have heretofore given you.

(Recess.)

Mr. Phelps: If your Honor please, so that we may understand each other, the records that counsel showed me were records which we furnished under a response to a notice to produce. I don't accede the contention that they are admissible in and of themselves, because of that they would require explanation of how they are kept, what they mean, and so forth. It would require a witness to explain these records; they are not self-explanatory.

However, I don't want to urge any objection. In fact, I am willing to state my understanding of what these show. Mr. Murman can correct me or ask me to add anything to it to amplify, if it is here, and I will endeavor to state the correct facts from these as though a witness were here to testify about it, if that is satisfactory. Here are the facts——

Mr. Murman: I think this being part of my case, I think [188] I should make the offer to the court and then if Mr. Phelps has any explanation we can, of course, produce such explanatory information that he wishes to establish the case as it goes along, but I have been furnished with these documents as the records of the defendant in connection with the operation of the train in question, and particularly as to the information on the white sheet of paper. I don't see how that needs any explanation, and I would be willing to submit to your Honor for examination.

Mr. Phelps: As to that, your Honor, I might say that was a compilation made from this record and other records. I think, Mr. Murman, I can do exactly what you are when I suggested this, but you

couldn't prove this without calling witnesses, and I am trying to stipulate to the facts. I will read this part first, is that all right or——

Mr. Murman: I don't see why I could read it.

Mr. Phelps: Well, it is tweedledee and tweedledum.

The Court: It doesn't make any difference who reads it.

Mr. Phelps: Except we don't want any errors to creep in.

The Court: Let me see it. I understand that these documents were produced in accordance with a notice to produce?

Mr. Murman: That is correct, your Honor.

Mr. Phelps: For an inspection.

The Court: Yes, for inspection.

Mr. Murman: These were the copies furnished to me rather [189] than my personally inspecting a series of records, which would have put the defendant to great inconvenience, as I understood it, and I took the word of Mr. Dunn as authenticating that information, as being the correct information, and was furnished with that document as the correct information.

Mr. Phelps: That is correct, your Honor, and I am offering to stipulate as a fact, but that is a compilation made from these and other records which he has forwarded to you, and others, and so far as that is concerned, there is no objection to that whole thing going exactly as it is with one very necessary added explanation which is,—well, which on the face of it shows that it requires.

The Court: Have you any objection to that explanation?

Mr. Murman: No, after I read he can make any explanation he wants to.

Mr. Phelps: Doesn't make any difference to me who physically reads it, if that is what he is quarreling about.

The Court: You may make your explanation afterward.

Mr. Phelps: May I say we are willing to stipulate to these facts, not asking him to produce witnesses to prove these facts.

Mr. Murman: I think under the rule it could be received any way.

Mr. Phelps: I think not. I want the jury to know this, that we are giving it to him and not just giving him something [190] he is entitled to otherwise——

The Court: Plaintiff's Exhibit 10 in evidence.

(Whereupon the document entitled "Run of Train No. 13" was received in evidence and marked Plaintiff's Exhibit 10.)

Mr. Murman: Thank you.

Ladies and gentlemen, I will read what I have here, and if Mr. Phelps has any further explanation to make, why, of course, I have no objection to him making that.

This piece of paper which I have is a carbon copy of an original and it has at the top the words "Run of Train No. 13, December 27, 1948—Klamath Falls, Oregon, to Gerber, California.

“Arrived Klamath Falls 2:00 a.m., left 2:25 a.m.”

I should state prior to that there appears on the righthand portion of the page just above the information I read about the arrival and leaving time, the words “15 cars,” which I understood when it was given to me to be the number of cars that consisted the train.

Then, the next after the arrival at Klamath Falls at 2:00 a.m. and leaving at 2:25 a.m., then it shows, “by Dorris, California at 2:52 a.m.”

and I understand that to mean it went by, that train, at that time, and did not stop.

Also, “by Mt. Hebron at 3:04 a.m., by Bray at 3:20 a.m., arrived Grass Lake 3:46 a.m., left 3:55 a.m. By Bolam [191] at 4:15 a.m., arrived Black Butte 4:36, left 4:45 a.m. Arrived Dunsmuir 5:34 a.m., left 5:45 a.m., arrived Redding 7:29 a.m., left 7:34 a.m., arrived Anderson”

and there is no arrival listed, but there is the leaving time as “left 8:30 a.m. By Cottonwood 8:36 a.m., arrived Red Bluff 8:55, left 8:58, arrived Gerber 9:10 a.m.”

That is the running time of the train on the day in question, as I understand it.

Mr. Phelps: That is correct; stipulate to that. May I add this, that of course the time is daylight saving time.

Mr. Murman: Here is a notation at the base, at the bottom of the page, which so states and——

Mr. Phelps: And the next times as you read, they are all Pacific times.

Mr. Murman: There is no question about that.

Mr. Phelps: All right.

Mr. Murman: Now, the time table schedule, ladies and gentlemen, is always, or generally, in Pacific Standard time. Railroads don't recognize daylight saving time normally, and deals with the standard time table schedule. For daylight saving time the clock is advanced an hour on each hour, that is, as soon as the train got into California.

This is the regular schedule. "Arrive at Klamath Falls 1:10 a.m., left 1:30 a.m., by Dorris at 1:48 a.m., by Mt. Hebron 2:03 a.m., by Bray at 2:20 a.m., arrive at [192] Grass Lake 2:40 a.m., by Bolam 2:55 a.m., arrive Black Butte 3:20 a.m."

Now, you notice an hour jump here, "arrive Duns-muir 4:15 a.m., leave 4:25 a.m."

That would, on daylight saving time, be normally 5:15 a.m. and 5:25 a.m.

"Arrive at Redding 6:10 a.m." For daylight saving time it would have been 7:10. "By Anderson, 6:21 a.m.," which would normally be 7:21 a.m. "By Cottonwood 6:28 a.m., arrive Red Bluff 6:50 a.m., and arrive Gerber, 7:05 a.m." Down at the base, the bottom of what I have read to you appears:

"California Daylight Savings went into effect March 14, 1948, and terminated January 1, 1949."

That, of course, explains the whole difference between all of these figures that I have read you apart from the actual difference which the daylight saving figure would show.

Is that a full explanation, now?

Mr. Phelps: With one exception, Mr. Murman.

Mr. Murman: All right.

Mr. Phelps: Did I understand you to say there was a change?

Mr. Murman: No, I just said about an hour jump, I imagine is running time between Black Butte and Dunsmuir, isn't that right, Mr. Phelps?

Mr. Phelps: No, this train left Klamath Falls, when it [193] left, it left on daylight savings time. All the times listed that you read as a time schedule are Pacific Standard time. No such hour jump.

Mr. Murman: Fine. I had in mind——

Mr. Phelps: Although it left Klamath Falls, Oregon, these times are recorded California Daylight Saving time because the crews run into California and for convenience they change their clock at Klamath Falls.

Mr. Murman: That is the division?

Mr. Phelps: Yes, that is the division.

Mr. Murman: I have one other matter, if the court please, before closing the plaintiff's case.

I have here, your Honor, the official publication of the United States Department of Commerce showing United States life tables and actuarial tables, ranging between range 1939 and 1941, and these tables show that as to a male at age 55 he would have an average future lifetime or life expectancy of 18.34 years. In other words, approximately 18 and 1/3 years.

As to females——

Mr. Phelps: I will object to any information——

The Court: You don't want the ladies on the jury to know that they will live longer than the man?

Mr. Phelps: I am sure they do, your Honor, but I don't see the materiality. It is to the death of this Mr. Shanahan and his expectancy—— [194]

Mr. Murman: I want to tell as to the life expectancy of Mrs. Shanahan, at least was an expectancy as long as her husband's.

Mr. Phelps: The question is, of course, to Mr. Shanahan's lifetime, because it is a question of Mrs. Shanahan's pecuniary loss and she could only expect to have a pecuniary loss during his normal life, and doesn't go beyond that.

Mr. Murman: I concede that—but if she should predecease him, the life expectancy, of course, couldn't——

The Court: You can stipulate according to those tables that she would live at least as long as he.

Mr. Murman: That is agreeable.

Mr. Phelps: Certainly.

Mr. Murman: That is the plaintiff's case, if the court please. The plaintiff rests. [195]

The Court: Before you proceed, Mr. Phelps, that case I mentioned yesterday was the case of Bickford v. Mauser, 53 Calif. Appell. 2d. I have forgotten the page number.

Mr. Phelps: I understand for the record counsel is withdrawing his position in that respect.

Mr. Murman: Well, depending upon the facts as they develop.

Mr. Phelps: Yes.

Mr. Murman: I understand there is some doubt about whether or not the statement was pre-existing statement due to what the witness couldn't recall,

so depending on what develops, we will cross that bridge when we come to it, Your Honor, if we may.

Mr. Phelps: Yes, then I have a matter to take up with the Court in the absence of the jury.

The Court: All right. Ladies and gentlemen, you are about to be allowed to go to the jury room for a little while, and when you do will you bear in mind the admonition I have heretofore given you. The bailiff will take you to the jury room while there are some arguments made to me. Well, perhaps we could let them go.

Mr. Phelps: I was thinking of that.

Mr. Murman: It is very close to 12:00 o'clock.

The Court: Instead, you will be allowed to go to luncheon now and return at 1:30. [196]

Mr. Murman: That is a half hour earlier than usual, Your Honor?

The Court: Yes, because, as I told you yesterday, I have to leave just a little bit before 3:30.

(Thereupon the jury was excused and the following proceedings were had outside the presence of the jury:)

Mr. Phelps: Now, then, may it please the Court, on behalf of the defendant Southern Pacific Company at this time I move for a judgment of dismissal pursuant to the appropriate Federal Rules of Civil Procedure and, in the alternative, for a directed verdict in favor of the defendant Southern Pacific Company, upon the ground that, first, that taking the evidence as you must at this point, there isn't any evidence sufficient to sustain a finding of any

liability on the part of the defendant Southern Pacific Company; that there is no evidence of any act or omission on the part of the defendant which proximately contributed to the cause of action, of any officer, agent, servant or employee of the defendant Southern Pacific Company; and on the ground that there is no showing of any negligence on the part of the defendant Southern Pacific Company; and on the further ground, if Your Honor please, that the evidence at this stage of the case can be only considered in one light, that the plaintiff—that is, the deceased himself—that the deceased, Mr. Shanahan, driving his car across the crossing as has been described by the witnesses, [197] must be held to be guilty of contributory negligence as a matter of law in driving in front of the approaching locomotive.

Now, then, if Your Honor please, in addition to the grounds specifically enumerated, I should like to point out certain points of evidence to you, and in doing so, ask that my grounds of motion include the matters I heretofore stated.

(Arguments of counsel for the defendant in support of the motion and arguments of counsel for the plaintiff in opposition thereto omitted.)

The Court: We will adjourn until 1:30.

(Thereupon this cause was adjourned to the hour of 1:30 p.m.) [198]

December 22, 1949, 1:30

(The following proceedings were had without the presence of the jury:)

Mr. Murman: If the Court please, Mr. Casebeer was asked to remain on the attendance of the Court. I assume we can release him at this time in view of our determination as to the problem of the past conduct, course of conduct that we were discussing earlier.

The Court: Yes.

Mr. Murman: So it will be agreeable that he be released at this time?

Mr. Phelps: Yes, Your Honor; I think for the record we might portray what happened in chambers. I should like to have the record show that I do enlarge upon the objection stated, and upon the additional ground that it is without foundation in that in this case there were eye witnesses to the actual happening of the accident. I understand Mr. Murman is not pressing his point.

The Court: Yes. The record can show that counsel and I discussed the matter of that objection which I sustained.

Mr. Murman: Yes, Your Honor.

The Court: In chambers. At that time I called attention of Mr. Murman to the rule that was just stated by Mr. Phelps that prior conduct is not really admissible in evidence unless [199] no eye witnesses to the accident, and for that reason I sustained the objection.

Another matter that I would like to direct to the

Court is the map which we have been using has never been given a number and although, as I have said, the plaintiff rests, at this time for the purpose of the record I would like to reopen the plaintiff's case to have this map put in evidence as Plaintiff's next in order for the markings and the various identifying figures that have been placed upon it.

The Court: So ordered. That is no objection?

Mr. Phelps: Only the objection, if Your Honor please, that the map hasn't been approved. I can not stipulate that the map is correctly drawn as of the time of the accident. I do have a map that is correct and will have the correct measurments.

The Court: Well, the trouble is that we have used this map right through during the trial of the case and the map anyway, is only admitted for the purpose of illustration.

Mr. Murman: That is correct, markings on it.

The Court: And I will allow it in for that purpose. Have it marked the next exhibit in order for illustration.

Mr. Murman: Plaintiff's 11.

Mr. Phelps: I have no objection to the reopening of the plaintiff's case for that purpose, but would like to state it is without foundation, it hasn't been established, hasn't been [200] determined, when the measurements for it were taken, and the scale and the details of it.

(Thereupon the map displayed on the black-board and marked Plaintiff's Exhibit No. 11 was received in evidence.)

(At this stage of the proceedings argument was had upon the motion for a non-suit. At the conclusion of the argument the Court ruled as follows:)

The Court: I will deny the motion for non-suit and let us go ahead with the trial as far as we can get today and I will study these cases. I deny that motion without prejudice to the renewal thereof at the conclusion of your own evidence.

Mr. Phelps: Very well, Your Honor.

(Recess.)

(The following proceedings were had in the presence of the jury:)

Opening Statement of Mr. Phelps not made a part of this record at the request of counsel. [201]

WILLIAM R. ORR

called as a witness on behalf of the defendant; sworn.

Q. (By The Clerk): Will you state your name to the Court and jury, please?

A. William R. Orr.

Direct Examination

By Mr. Phelps:

Q. Mr. Orr, what is your full name, please?

A. William Richard Orr.

Q. Where do you live?

A. Dunsmuir, California.

Q. By whom are you employed?

(Testimony of William R. Orr.)

A. Southern Pacific Company.

Q. In what capacity?

A. Assistant engineer.

Q. How long have you been in that capacity?

A. About ten years.

Q. As such, is one of your duties to prepare maps and make measurements of the right of way?

A. That is right.

Q. Did you have an occasion at the request of your employer to make measurements and prepare a map in the town of Anderson showing the crossings at Howard Street, the Howard Street crossing, together with the North Street crossing?

A. Yes.

Q. Tell us whether those measurements—did you make measurements? [202]

A. Yes.

Q. By way of a steel tape?

A. Yes.

Q. And instruments?

A. And transit.

Q. Transit?

A. Yes.

Q. Have you then, after taking those measurements, prepared a map by the use of the measurements?

A. Yes.

Q. Will you step over to this map, and I will ask you if you can identify that as the map which you prepared, or which was prepared under your direction and supervision?

A. (Leaving witness stand): It is.

Mr. Phelps: I will ask that that be marked.

(Thereupon the map referred to was marked Defendant's Exhibit D for identification.)

(Testimony of William R. Orr.)

Q. (By Mr. Phelps): Now, then, Mr. Orr, stay here if you will. Does this map truly and correctly portray the scene of the accident, drawn to scale?

A. It does.

Mr. Phelps: I ask that that be introduced in evidence.

Mr. Murman: Well, just a moment. We haven't had any date when those measurements were made, Your Honor. [203]

Mr. Phelps: Very well, I will establish that, Your Honor.

Q. Now, when did you make those measurements? A. January 4, 1949.

Q. And in your department, the engineering department, is part of your job to know what changes and corrections and additions were made in the railroad? A. That is right.

Q. Including the division where Anderson is?

A. Anderson?

Q. Yes. A. Yes.

Q. To your knowledge, were any changes and corrections made from December 27, 1948, to January 4, 1949? A. On that map?

Q. No, any changes or corrections made in the railroad between that time, at Anderson.

A. Between what dates?

Q. December 27 to the date of the accident and the date of your measurements, January 4th.

A. No, there was no change.

Mr. Phelps: Now we offer it, if Your Honor please.

(Testimony of William R. Orr.)

Mr. Murman: His testimony, as I understand it, Your Honor, is limited to the railroad. If there are other matters on the map, it seems to me the map might be introduced for the [204] purpose of illustration, but if it is going to be contended that every line on the map is just as it was on the day of the accident, which was over a week prior thereto, I think we will have to have proof of all that.

Mr. Phelps: Then I renew my objections to Mr. Murman's map, if the Court please, and move to strike it.

Mr. Murman: That is only in for illustration.

The Court: I will allow this in for illustration also.

Mr. Phelps: I am offering it for the purpose of showing the conditions of the railroad at the time and the physical objects shown on that map.

The Court: I think I will admit it. I think there is sufficient foundation.

(Thereupon the map referred to was admitted into evidence as Defendant's Exhibit D.)

Q. (By Mr. Phelps): All right, now, then, I want to call your attention to the Howard Street here, and I notice a brown line running directly crossways to the railroad tracks there. What is that?

A. That brown line? That is the Howard Street crossing.

Q. That is the Howard Street crossing? Now I am pointing to an object. What is that?

A. That is a signal.

(Testimony of William R. Orr.)

Q. What kind of a signal?

A. Wigwag, they call it. In other words, to warn motorists. [205]

Q. Can you tell us whether or not the wigwag signal is in the position it was when you made your measurements?

A. It is.

Q. And now, then, I notice that we have two—I am pointing to, well, there is a cross sign there, looks like a stop sign. What is that?

A. That is an arterial stop sign.

Q. That I am now pointing to?

A. Yes. It reads "Stop."

Q. All right, let's mark Stop Sign. What is this little mark here?

A. We call that a cross-buck. That is a railroad term. CS-13.

Q. Now, then, Mr. Orr, I notice that to the right of that there is also stop sign and a cross-buck and two crossings. Will you tell us what that is?

A. That is an error and I found it out and didn't change the map, just crossed out.

Q. As you were preparing the map from your notes, am I correct, after having prepared it you then checked your notes against the map?

A. Yes, that is right.

Q. In all particulars, and found this error?

A. That is right.

Q. And that is the only error you found? [206]

A. Yes.

Q. So that the crossed out part is not the correct position, but where it is is the correct position?

(Testimony of William R. Orr.)

A. Yes.

Q. Can you tell us where the base of that arterial stop sign would be, in what portion of the——

A. Portion of the—the lower portion, of course, is the base. That is in the ground.

Q. Now then, the same thing applies to the wig-wag signal and the cross-buck sign?

A. Yes.

Q. Do you have the measurements or distance of the arterial stop sign to the center of the track?

A. Yes.

Q. Will you take the stand again?

(Witness resumed the stand.)

Q. Do you have that measurement? What is it?

A. The distance out from the center line of the main track of that to the stop sign, 33 and seven-tenths feet.

Q. Then what is the distance between the center line of the main track and the center line of the track to the east of that?

A. 18 and three-tenths feet.

Q. I beg your pardon?

A. 18 and three-tenths feet. [207]

Q. And between the track that I am now pointing to, and which continues on across the map without a switch. What is the distance between the main track and the passing track? A. 13 feet.

Q. That is the track to the west?

A. Thirteen feet.

Q. Yes. Can you tell us whether the 13 feet is the ordinary, usual, standard clearance in railroads?

A. That is the least they can go.

(Testimony of William R. Orr.)

Q. That is the standard clearance, is it?

A. Yes.

Q. How far is the—well, the station building is correctly plotted?

A. That is right.

Q. If we want to determine any distance we can scale it off? A. Yes.

Q. What is the scale on the map?

A. One inch on the map equals 20 feet on the ground.

Q. Will you step up, please, and give us the distance, then, between the crossing and the most southerly portion of the station, or do you have it there?

A. It is 146.7 feet. That is the center line of the main line and right angle from the station.

Q. How long is the station building proper?

A. Station building proper is 125 feet on the building proper. [208]

Q. What is the distance between Howard Street crossing and the Ferry Street crossing.

A. 530 feet.

Q. And the distance between the Ferry Street and the North Street crossings?

A. I don't have that; it is 975 feet from the Howard Street crossing to the—

Q. To the North Street crossing?

A. Or a distance of 444 feet.

Q. On the North Street crossing there is some—on either side there are some indicators. What are those?

(Testimony of William R. Orr.)

A. Crossing bells to warn motorists and some cross-bucks.

Q. Flashing lights? A. Flashing lights.

Q. Now then, can you tell me whether you visited this scene which is portrayed by this map on December 27, 1948? A. I did.

Q. So that can you state, so that there will be no question about it, that the conditions, from your observation, were the same, the scene portrayed there on or about December 27, from personal observation, as they were when you made the observations for this map?

A. There was no change whatsoever.

Mr. Phelps: You may cross-examine.

Cross-Examination

By Mr. Murman:

Q. Did I understand that, Mr. Orr, your measurements that you made were confined within the railroad right of way, is that correct?

A. That is right.

Q. In other words, you didn't make measurements in this area contained on the map where Howard Street appears and where Ferry Street appears and where North Street appears as to property lines and store lines?

A. We have ties to those store lines with our railroad, actual ties.

Q. What?

A. In other words, our railroad is tied to the town of Anderson by engineer stations.

(Testimony of William R. Orr.)

Q. But you didn't make measurements yourself in order to ascertain what you have represented here at the base of the diagram as being the intersection of Howard Street and Center Street, Ferry Street and Center Street, and North Street and Center Street, is that correct?

A. That is correct.

Q. And that was true of the Highway 99 area which you show at the upper portion of the map?

A. I did make a tie of that U. S. 99. U. S. 99 right of way and ours is common.

Q. Do you mean to say the width of 99 is only the width which is shown here? [210]

A. That is the traveled way.

Q. Pardon?

A. That is the traveled way. That is the paved portion.

Q. Paved portion? A. At that time.

Q. Was that a two-lane highway at that time?

A. It was.

Q. Did you make measurements here of the fire-house? A. Yes.

Q. And the store? A. Yes, sir.

Q. You made those measurements yourself?

A. Yes.

Q. Those measurements were made in January of 1949? A. January, 1949.

Q. Now, there have been some other marks made on here that you haven't explained. Can you step down here and tell us what those are?

(Witness left the witness stand.)

(Testimony of William R. Orr.)

Q. I am pointing to a black dot, which apparently runs into the main line at a point where a switch occurs. Where is that?

A. That is a switch stand.

Q. What is this little circle which is above it to the left?

A. That is a signal pole light, a pole for a signal light. [211]

Q. You mean there is a pole, the base of which is there? A. That is right.

Q. You didn't show the elevation of the pole as you do of these other items, did you?

A. I just put a dot to indicate the location.

Q. The way you have this wig-wag signal placed, it looks like it is over on its side. That is the position of it? A. No, sir.

Q. Doesn't it go straight up in the air?

A. Vertical.

Q. Why did you put it on its side like that?

A. It is a flat map.

Q. Well, you have this cross-buck and stop sign vertical down below on the other side of the crossing. Why wouldn't those be horizontal as well?

A. That is a flat projection, too.

Q. Don't these items here, the cross-buck and the stop sign, extend upward in the same general position as the wig-wag?

A. It could be. It just happened to be put on that way. They would look the same if turned around the other way.

Q. They should, then, be consistent?

(Testimony of William R. Orr.)

A. That is right.

Q. And either all the one way or all the other, is that right? A. That is right.

Q. Now, you have some dotted lines in a little circle over on [212] the right by the station. What is that?

A. A pole and a guy, guy wire for the pole, power pole.

Q. You mean there is a guy wire extending from the pole to the ground? A. Upper one——

Q. This one (indicating)?

A. No, this one, that is the guy and the end of the line is the pole.

Q. The pole there and the guy down there?

A. Yes. The same way with the other.

Q. You have a circle at the point where the guy is and an anchorage at the point where the pole is, is that right?

A. Well, the pole is where the dash is.

Q. That is wrong, isn't it? This should be up where the anchorage is and the anchorage should be down where the pole is, isn't that correct? Maybe you were right the first time. I don't want to mislead you, we just want to get it right. Is that the pole you were talking about there (indicating)? Is that the pole that this little circle is supposed to have located? A. I am just trying to think.

Q. You made all those measurements personally?

A. I did. [213]

Q. Can't you remember back whether there was a pole on one end or the other, or vice versa?

(Testimony of William R. Orr.)

A. The guy is here (indicating). The guys are shown.

Q. Well, that is what I thought. In other words, you have it correct although at first you thought maybe——

A. Yes, trying to say too much.

Q. Now, these other dots that we have along here, those are all single poles?

A. Single poles.

Q. And what is this circle with some projections on it?

A. That is a stand to hang orders for train engine crews.

Q. Is that the semaphore stand (indicating)?

A. A hoop stand.

Q. Now, this hoop stand you are pointing to is between the track on the east and the main line, isn't that correct? You don't show that at all on there, do you?

A. It is in the wrong location, it should be between the main and the siding, or—between the two tracks.

Q. This is an error here?

A. It should be over.

Q. Should be up there (indicating)?

A. That is where it should be on that (indicating).

Q. Well then, tell me where is the semaphore pole?

A. The semaphore is right here (indicating).

(Testimony of William R. Orr.)

Q. Point to it. [214]

A. This is where, the station signal (indicating).

Q. I see, the one you have laying down on the side, the crossing——

A. That is the station signal.

Q. Again, to be consistent, all should be vertical or all should be on their side, is that correct, referring now to the cross-buck and the semaphore here and the wig-wag up here; isn't that right, or ought to, to be consistent? A. Yes.

Q. Yes. That is probably true of these others over here, that is the cross-bucks and stop signs, and the same down here (indicating). Isn't that correct, all ought to be on the side or vertical, isn't that right? Can you answer so that the reporter will get it? A. Yes.

Q. Now, these other black dots we have here on the east side of the east siding, what are they?

A. Western Union poles.

Q. Did I understand from this diagram there is no wig-wag at the Ferry Street crossing?

A. That's right.

Q. And at the North Street crossing you have a double flasher on the west side and on the east side, is that correct? A. That is correct.

Q. Now, you haven't attempted to show any of the improvements [215] on the west side of the highway, have you? A. No, sir.

Q. But there are improvements up there, aren't there?

(Testimony of William R. Orr.)

A. It is undergoing construction now.

Q. Yes, but I mean when the accident occurred. There were some improvements up there, were there not?

A. No.

Q. Weren't there?

Mr. Phelps: Tell him what you mean by improvements.

Mr. Murman: Yes, I will point here. We have a photograph. There were signs and buildings and trees and here are more buildings, and I think if you look down the track, you can get a better view.

The Witness: Pardon me?

Q. You didn't understand improvements?

A. I didn't understand your question.

Q. Something built on the property.

A. It was there, yes.

Q. There were improvements all along there?

A. Yes, definitely.

Q. Just as there were improvements on the east side all around here (indicating) where you saw, Howard Street and Ferry Street and Ferry North, isn't that correct?

A. Yes.

Q. Now, you can take the witness stand. I show you plaintiff's [216] exhibits 3, 4, 5 and 6. Do those correctly reflect the physical arrangement of the various items that you have shown here on the map as of the date you made the map and took the measurements for the map?

A. They do.

Q. All right.

A. As near as I can tell.

Q. As near as you can tell, they do?

(Testimony of William R. Orr.)

A. Yes.

Q. Now, calling your specific attention to plaintiff's exhibit 3 in evidence, can you tell me at about what point that picture was taken in relation to your map here where you show the stop sign and cross-buck?

A. No, I couldn't.

Q. You couldn't. Was it taken, as far as you can tell, somewhere in the vicinity of the cross-buck and stop sign that you have shown there on the map at the Howard Street crossing?

Mr. Phelps: The question has been asked; he said he couldn't.

The Court: Well, I will tell Mr. Murman that the same question shouldn't be asked more than twice.

Mr. Murman: I will try not to, your Honor. I think there was an answer to that.

The Court: Yes, there was.

Mr. Murman: I have no further questions of this witness. [217]

Mr. Phelps: I have no further questions. May the witness be excused?

Mr. Murman: He may. I submit to your Honor, except for the right of way area of the railroad, I contend that this map should not be in evidence as the proof of the physical fact. I think it illustrates the area we are interested in, but it has sufficient errors in it so that it should not be accepted in evidence as to proof of the physical fact, and I re-submit my motion to have it introduced only for purposes of illustration.

(Testimony of William R. Orr.)

Mr. Phelps: Will you point out the errors so I can correct them while he is on the stand?

Mr. Murman: The witness has pointed them out.

The Court: He has already corrected them and I don't think it is significant enough for me to rule the map out.

Mr. Murman: I don't want your Honor to rule the map out. I thought it should be in only for illustration, your Honor. That is my position.

The Court: Yes, that is a distinction without a difference, so I will allow it to stand.

Redirect Examination

By Mr. Phelps:

Q. Mr. Orr, the location of the railroad as indicated by these dotted lines at the Howard Street crossing is correctly portrayed, is it?

A. Yes, sir. [218]

Q. And that is from measurements made by you?

A. Yes.

Q. And the point where it turns, is that the point where it joins the regular paved portion of the road shown on the photographs? A. Yes.

Q. At the bottom of the incline to the tracks?

A. Yes.

Mr. Phelps: No other questions.

Mr. Murman: No further questions.

The Court: You may step down.

(Witness excused.)

Mr. Phelps: May I inquire the intention of the court to take a recess before going on to 3:30, so I can time my witnesses accordingly. I don't want to if I can get rid of one——

The Court: I don't think we'd better. We are going to stop here at 3:25.

Mr. Phelps: Fine. Call Officer Sublett.

FLOYD SUBLETT

called as a witness on behalf of the defendant,
sworn.

The Clerk: Will you state your full name to the court and jury, please?

A. Floyd Sublett. [219]

Direct Examination

By Mr. Phelps:

Q. Where do you live, Mr. Sublett?

A. I live at 2176 Place Street in Redding, California.

Q. And what is your business or occupation?

A. I am an officer of the California Highway Patrol.

Q. How long have you been such?

A. Since September, 1935.

Q. And how long have you lived and around that part of the state of Redding, Anderson and environs?

A. I have lived within the county all my life with the exception of a year or two working out of the county, away from there.

(Testimony of Floyd Sublett.)

Q. Are you personally acquainted with Mrs. Shanahan? A. Yes, I am.

Q. And are you, were you personally acquainted during his lifetime with Mr. Ellis Shanahan?

A. Yes, I was.

Q. Did you know him quite well?

A. I knew Mr. Shanahan quite well.

Q. And did you know Mrs. Shanahan before ~~she~~ married Mr. Shanahan? A. Yes, I did.

Q. Now then, Officer, did there come an occasion on December 27, 1948, for you to investigate an accident in which Mr. Shanahan was killed? [220]

A. There was, yes.

Q. Will you tell where you were when you received the call advising you of the accident?

A. I was at my home. I received the call from my sergeant and was directed to go to Anderson and investigate an accident that happened on the railroad crossing involving a train and an automobile.

Q. And what time approximately was that call?

A. That was approximately 8:00 o'clock in the morning.

Q. And how long—when, to the best of your recollection, what time did you arrive in Anderson at the scene of the accident?

A. I'd say approximately 8:15.

Q. And when you arrived there first—pardon me,—first, Officer, how did you go there?

A. In the State Patrol car.

Q. In the white cars furnished by the state?

(Testimony of Floyd Sublett.)

A. Black and white car, yes, sir.

Q. As you went there, can you tell us whether or not you used your headlights, that is, for visibility ahead?

A. Well, I believe I used my headlights when I first started out. I had my red light on and as it became lighter, as I recall, I cut down to my parking lights, and the red light, as it shows up more visible.

Q. And how long did it take you to get to the scene of the [221] accident, in minutes?

A. Oh, perhaps, from the time I got the car, about 15 minutes.

Q. All right. Now then, Officer, when you arrived at the accident, what was the first thing you did; tell us.

A. I parked my car, got out and went over. I saw the wreckage of an automobile and saw a body lying on the ground just north of the wrecked car. I immediately went there and touched the man's pulse to see if there was any sign of life. Also checked to find if there was any kind of respiration and attempted to find out whether he had passed away.

Q. And concluded what?

A. It was my conclusion that he was dead at the time.

Q. Now, then, what was the next thing you did?

A. Then I immediately radioed my office and asked them to notify the coroner to come to the scene.

(Testimony of Floyd Sublett.)

Q. At that time there were people around, I presume?

A. There were a number of people when I arrived and other people coming and stopping at the scene during the time I was there.

Q. Were there any other highway patrol officers there at that time?

A. Not right at that time, no, sir.

Q. Any before that, to your knowledge? [222]

A. Not to my knowledge.

Q. Had there been any before in the ordinary course of business of your investigations, would that appear on the reports that you made?

A. I didn't quite understand the question.

Q. If there had been any highway patrol officers who had arrived ahead of you, would that become known to you in the course of your making your report to the highway patrol?

A. Yes, it would.

Q. And did that appear in the records in the report which you turned in? A. No.

Q. All right. Now then, did you inquire at the scene of the accident as to who had witnessed the accident? A. I did.

Q. And what did you find out there and then?

A. I found out that no one present, at least no one present volunteered the information that they had seen it.

Q. All right. Now then, how long did you stay at the scene of the accident?

A. I would say I was right at the scene of the

(Testimony of Floyd Sublett.)

accident until some time after 9:00 o'clock, perhaps about 9:30, and stayed in the vicinity for some time after that as I went across the street after my investigation was complete and had breakfast. [223]

Q. Did you go down to the head end of the train? A. Yes, I did.

Q. And where the engineer and the fireman were? A. Yes.

Q. And except for going down there, up until the time you went to breakfast, were you always at the scene of the accident or down the track where the engine was, is that right?

A. That is right.

Q. Now, do you know Mr. Rowe, a signal maintainer for the Southern Pacific?

A. Yes, I do.

Q. And can you tell us whether or not he arrived at the scene of the accident that morning?

A. Yes, he arrived after——

Q. What time, about?

A. It was after the train that was involved in the collision had proceeded on its way. I would say it was 9:00 o'clock or shortly thereafter.

Q. That Mr. Rowe arrived? A. Yes.

Q. Now then, you say the train proceeded on its way? A. Yes.

Q. That after you had taken charge and given permission for it to leave? A. Yes. [224]

Q. Did you take charge of the investigations then? A. I did.

(Testimony of Floyd Sublett.)

Q. All right. Now, where did Mr. Rowe come from? Did you see him?

A. He came from the south.

Q. On this map from this direction (indicating)?

A. Yes.

Q. And by automobile or by track?

A. On a motorcar on the track.

Q. On the track? A. Yes.

Q. And when he arrived, where were you?

A. I was standing at the crossing.

Q. Now, at the crossing you mean the Howard Street?

A. The Howard Street crossing; yes, sir.

Q. And when he arrived, did he immediately come over to you?

A. He got off his car, walked over to where the crossing was. I walked over and asked him if he was going to test the bell. He said he was. I told him I would like to stay while he tested the bell, which I did.

Q. Was anybody else present when you tested, while he tested the bell?

A. I believe the coroner was. He had arrived in the meantime.

Q. All right, now, will you tell us what was done in testing the bell and what the results of that test were? [225]

A. Well, Mr. Rowe opened up the control that houses the relays that operate the bell and he short-circuited the relays out, the bell started ringing,

(Testimony of Floyd Sublett.)

and I observed the light was lighted, the red light, and the banner of the wig-wag.

Q. That is the red light in the wig-wag was burning? A. Yes.

Q. The bell rang properly?

A. That's right.

Q. And what about the movement of the arm of the wig-wag?

A. It moved as normally should, normally does.

Q. And you tested more than once, he tested it more than once——

A. Yes, he tested, those relays, one for the southbound movement of trains, one for the northbound movement, and he tested it two or three times to see if it would operate each time, which it did.

Q. And from your investigation were you satisfied that the arm, wig-wag arm, and so forth, was in good repair and order? A. Yes.

Mr. Murman: That calls for a conclusion of the witness; object to it on that ground.

The Court: Well,——

Mr. Phelps: He is making an investigation, if your Honor please.

Mr. Murman: This, as I understand it, is a shortening of the relays. That is quite different than running the train. [226]

The Court: I will strike that, I will sustain it.

Mr. Phelps: Very well, your Honor.

Q. Then, do you know what the effect of shorting is across the relays as compared to the effect of the running of the train down the line?

(Testimony of Floyd Sublett.)

Mr. Murman: I object to that as immaterial, if the Court please.

The Court: I will allow it.

A. It produces practically, it produces the same results. In other words, the wires to the relays come directly from the track itself.

Mr. Murman: Now, I move that be stricken on the ground that this witness has not been shown to be an expert in the matter of electric circuits. He was only an investigating officer, and all we are concerned with here is the activation of the wig-wag from a train running on a track, not from shorting of the relay. His statement is a conclusion, and I therefore move to strike his answer.

Mr. Phelps: I will withdraw the question, if your Honor please, and prove it by another witness, if there is any question of that. I don't want there to be any question.

The Court: All right, we will strike it, the question and answer, out.

Mr. Phelps: All right, it can be proved by another witness. [227]

Q. Now then, may I ask you this: Did you make any other observations of your own with respect to the working of that wig-wag signal on that day?

A. Yes, on two occasions I checked the operation of it while trains were passing the point and approaching the wig-wag.

Q. And did it operate correctly on that occasion? A. It did.

Q. And will you tell us whether that was for a

(Testimony of Floyd Sublett.)

movement—when the train moved over the main line?

A. Yes, it was a train moving through and passing right on through the town of Anderson in both cases.

Q. Can you tell us whether it was from the north or from the south?

A. The first train was a freight train from the north. The second train was a train, No. 16, from the south.

Q. And you made those observations yourself that morning?

A. I did.

Q. As a part of your investigation?

A. It was that day.

Q. It was that day?

A. Yes, sir.

Q. Was that before or after you left the scene of the accident, do you remember?

A. After I left the scene of the accident.

Q. Came back? [228]

A. Well, I was patrolling that beat past Anderson during the day.

Q. And it was just a happenstance?

A. No, it was my thought to check that as to get an accurate check of the working operation of it.

Q. All right. And so that showed the actual working operation with a train on the track?

A. Yes.

Q. And the same—it was the same results as the test with shorting it through the relays?

A. Yes.

Q. The wig-wag moved back and forth, the light

(Testimony of Floyd Sublett.)

burned and the bell rang? A. That's right.

Q. Now, then, in the course of your investigation, did it ultimately come to your attention that a Mr. Hewes, a Mr. DeRosa, were said to have seen this accident? A. Yes.

Q. And in the course of your investigation did you have an occasion to interview these two men?

A. I did.

Q. Can you tell us where it was and when that was?

A. It was in the highway patrol office in Redding, I believe, the following day. I am sure it was the following day after the accident. [229]

Q. The day after, the 28th of December?

A. Yes.

Q. 1948. Who was present?

A. Captain Foster, my superior officer.

Q. Anyone else?

A. No one else right close. There were other people in and out of the office, other employees in the vicinity.

Q. And in the course of your investigation of this accident, did you interview those two men?

A. Yes.

Q. And in the presence of Captain Foster?

A. Yes.

Q. And in the course of that investigation did Mr. Hewes tell you that he didn't know whether the wig-wag was working or not?

A. Yes, he told me that.

Q. Did Mr. DeRosa tell you that also?

(Testimony of Floyd Sublett.)

A. He also told me that he didn't know.

Q. And that he didn't look?

A. That's right.

Q. And the same is true with Mr. Hewes?

A. Yes.

Q. Now, then, as a result of your investigation, was any citation issued to any member of the train crew?

A. No, there wasn't. [230]

Q. Was there any action at all taken on the recommendation of the highway patrol?

A. No.

Mr. Murman: Now that is immaterial, if the Court please, what action was taken by the highway patrol. That doesn't bear on the negligence here.

Mr. Phelps: We won't press it.

The Court: All right.

Mr. Phelps: I think that is all, your Honor.

Cross-Examination

By Mr. Murman:

Q. When you left your home that morning in response to that call, what was the weather on that day?

A. It had been raining, the highway was still wet. It wasn't raining at the time; however, the windshield collected a sort of mist during the course of travel.

Q. Did you have to use your windshield wipers?

A. Well, I don't recall whether I had to use them or not. I know the air was moist. It was cloudy, low-hanging clouds and later, a little later in the day, it rained some more.

(Testimony of Floyd Sublett.)

Q. You got to the scene of the accident about 8:15 as I understand it?

A. That is as near as I can place the time; yes, sir.

Q. And did you learn afterwards that the collision occurred about a quarter of eight, in that neighborhood?

A. Approximately 7:47. [231]

Q. Yes. You got there just about a half hour afterwards, is that correct?

A. Some 25 minutes to a half hour, yes.

Q. Now, did you ascertain the point of the collision in your investigation?

A. Well, the front end of the train struck the right-hand side of the car to the rear of the door, the rear of the right-hand door.

Q. What kind of car was it?

A. It was a 1937 Plymouth coupe.

Q. Was the impact—the impact of the car was to the rear of the single door on the right-hand side, is that right?

A. Yes, that is the main portion of the impact.

Q. And where in relation to the crossing, itself, did the impact occur, or did you ascertain that?

A. There was no way to tell exactly. The only marks I saw was the gravel off of the roadway, and, as I said, the roadway was wet and when I arrived there were no marks on the roadway itself to tell the exact position of the car itself in relation to the right or left-hand side of the roadway.

Q. The marks in the gravel, were they to the west or to the east?

(Testimony of Floyd Sublett.)

A. They were to the west.

Q. To the west? A. Yes. [232]

Q. Were they beyond the switch or somewhere between the switch and the crossing?

A. There was one mark just off the roadway, perhaps not more than a foot.

Q. Could you come down and mark that for us here?

(The witness left the stand and went to the blackboard.)

Q. Do you understand the map, officer?

A. I take it this is the station?

Q. Yes.

A. Anderson; and this is the crossing?

Q. As I understand the map, north is the right, south to the left, west to the top, and east to the bottom, as a general directional marking.

A. Yes. As near as I can place that, there was a marking right off the roadway near the rail, the nearest marking to the crossing that I found.

Q. Is that about correct?

A. That is about right.

Q. Right here.

Mr. Murman: I will mark that "S-1," your Honor.

The Court: Yes.

Q. (By Mr. Murman): The other markings were further to the south?

A. Yes, between here and a point some 100 feet to the south and a short distance to the west of the main line track. [233]

(Testimony of Floyd Sublett.)

Q. Where did you find the car with relation to the crossing, about how far south?

A. Approximately 100 feet. Now, I stepped that distance off. I didn't have a tape line with me at the time.

Q. And the body, was it between where the car was and the crossing?

A. Yes, the body was just a short distance north of the car.

Q. You have indicated the general area right near the switch standard here. Is that about where you recall finding the body and the car?

A. It was far enough away from the switch standard out there, some, I believe, 30 to 35 feet from the track. I never placed the switch standard as a mark, I couldn't say, but I did step the distance from the crossing to the car which I estimated at that time to be approximately 100 feet.

Q. As I understand your answer, then, in relation to the switch standard you can't mark where you found the body, on this map?

A. No, not in relation to the switch standard.

Q. Can you state the distance with relation to this pole that has been designated here, which is a little bit further to the south?

A. No, I don't recall whether that pole was north or south of the car.

Q. All right, that is all right. Your best recollection is [234] that the car was about 100 feet south and to the west of the right of way?

(Testimony of Floyd Sublett.)

A. That is right.

Q. And the body a little short of that?

A. The body a little short of that, yes, sir.

Q. Thank you, Officer. Will you take the stand again, now?

(The witness resumed the stand.)

Q. Now, we have a picture here of a wrecked automobile, Plaintiff's Exhibit 7. I will ask you to look at that and state whether or not that appears to be a picture of the automboile as you saw it. Of course, it is in a little different location there. I am just asking you to look at the automobile now.

A. Yes, I realize that, sir. Yes, it looks to be the same car, approximately the same damage.

Q. According to your statement the impact took place somewhere to the rear of the right door, is that right?

A. Yes. Well, right in that vicinity where the dent is in the frame.

Q. Can you mark that?

A. (Marking exhibit): That is approximately, or as near as I can.

Q. Just put a cross there.

Mr. Murman: That cross, your Honor, is being placed near the rear right wheel on Plaintiff's Exhibit 7. [235]

Q. You said you went down to the head end of the train and saw the engineer and fireman?

A. Yes.

Q. Did you have any conversation with either of them?

(Testimony of Floyd Sublett.)

A. Yes, I asked the engineer what speed he was traveling.

Q. What did he say?

A. He said approximately 70 miles an hour. That was his speedometer reading.

Q. Was there anything else said at that time?

A. I asked him if he saw the car before the crash. He said no, he didn't, the car come from the opposite side of the train, and his first warning of it was when the fireman called to him to stop the train, or some words to that effect. In other words, the fireman gave him the information that he was to stop.

Q. Was there anything said about the wig-wag by the engineer?

A. Well, I can't seem to recall just what he said on that. Perhaps I asked him, and I am not quite positive about it.

Q. Didn't he say he didn't see it operating?

A. Well, as I say, I don't know whether he did.

Q. What is your best recollection?

A. Well, I don't recall that conversation regarding a wig-wag, whether or not I talked to him about it. I possibly did. I may have asked him about it.

Q. You have some recollection that you did talk to him about [236] it, is that correct? It isn't very clear in your mind, but you have some recollection?

A. That is right.

Q. And you can't tell us now whether he didn't say, as a matter of fact, that he didn't see it

(Testimony of Floyd Sublett.)

operating? You can't tell us that to be his answer, is that correct?

A. No, I can't seem to recall the conversation on it. I probably, without doubt, did ask him about it.

Q. But you don't recall his answer?

A. No, I don't right at the present.

Q. That is one of the rather important elements of your investigation, wasn't it?

A. Yes, it is.

Q. And you talked to the engineer, the only member of the crew, of that crew, which was on the right-hand side, same side that this wig-wag was on, and you can't recall his answer to that question?

A. No, I am sorry, I don't know what his answer was and I am not quite sure whether we talked about it or not. I believe we did.

Q. Did you make a report in which you set forth what information you got from the various persons you talked to?

A. Yes.

Q. Where is the report?

A. I have no report on that with me, I am sorry.

Q. Is there a report on it?

A. Yes, there is a report, perhaps, in my notebook.

Q. Where is your notebook?

A. It is in Redding.

Q. Can you get that down here?

A. Well, possibly can in time.

Q. I think we should have your record to refresh your recollection, to see whether you made a nota-

(Testimony of Floyd Sublett.)

tion on that subject. Do you think you can do that?

A. Possibly can.

Q. Before you came down here to testify, didn't you go over your notebook?

A. Well, I checked my notes some time back on it and when I came down here to testify I didn't know I was coming at the time that I did leave until just shortly before I left.

Q. Did you just get here today?

A. No, sir, I didn't; I came down a couple of days ago.

Q. And you brought nothing with you in the way of notebook or reports that you made in connection with your investigation, is that right?

A. No, I didn't, I am sorry.

Q. Do you remember talking with Mr. Wickfield of the Bureau of Internal Revenue?

A. Yes.

Q. You see him here in the court room, don't you, sitting back [238] there? A. Yes.

Q. Do you recall any conversation with him about what the engineer said about the wig-wag?

A. Yes, we were talking about it.

Q. But you can't tell us now?

A. We talked about all phases of the accident.

Q. But you can't tell us now on this very vital point what that engineer said to you about him seeing the wig-wag or not seeing it, whether it was operating or it not operating?

A. I am sorry, but I just can't recall.

Q. Don't you also remember that when you

(Testimony of Floyd Sublett.)

talked to Mr. DeRosa and Mr. Hewes they said they didn't see the wig-wag operating? A. Yes.

Q. So it wasn't that they were not sure whether it was operating or not, but they didn't see it operating, is that correct?

A. They said they couldn't tell me whether it was operating or wasn't.

Q. Didn't they also say they didn't see it operating? A. They said they didn't look.

Q. Both of them said they didn't look?

A. Mr. DeRosa or Mr. Hewes, rather, told me that he didn't see it, he didn't look. I asked Mr. DeRosa if he saw whether it was operating or not, and he said, "No, I didn't look, either." [239]

Q. Both of them said they didn't look?

A. Yes.

Q. But in addition to that they said they couldn't tell you whether it was operating or not?

A. That is right, they said they couldn't tell me.

The Court: Well, it is getting to be 3:35 now.

Mr. Murman: I am not through with this witness, I am sorry.

The Court: No. If that is true, he will have to be back here Tuesday. We will adjourn now until Tuesday morning at 10:00 o'clock.

Mr. Murman: May I ask your Honor to instruct the witness to return at that time with his notebook?

The Court: Yes. You could return at that time?

The Witness: What time was that, sir?

(Testimony of Floyd Sublett.)

The Court: Next Tuesday morning at 10:00 o'clock.

The Witness: Tuesday morning at 10:00 o'clock.

The Court: We will adjourn now, and during recess, ladies and gentlemen, bear in mind the admonition that the Court has heretofore given you, and I wish you all a very happy holiday.

(Thereupon, an adjournment was taken to Tuesday morning, December 27, 1949, at the hour of 10:00 o'clock.) [240]

December 27, 1949, at 10:00 o'Clock

(The following proceedings were had in chambers.)

The Court: Let the record show counsel are here in chambers talking to the judge about a certain incident that occurred on Thursday afternoon when the jury was discharged for over the Christmas holidays. As I understand it, when the jury was passing out of the court room, several of them had already stepped through the door, the plaintiff arose and simply said, "Merry Christmas" to them, or words to that effect.

Mr. Murman: I didn't hear it, Judge. I was busy and when Mr. Phelps called it to my attention I immediately went over and asked Mrs. Shanahan if she had said Merry Christmas and she said, "Yes," and with that she more or less broke down and wept and said she didn't know she was not supposed to.

Mr. Phelps: What happened was this, that as they were leaving, a bunch of them were still in the court room, and some may have left (I don't know how many were still in the court room) but at any rate, as they were leaving the box and were filing out, Mrs. Shanahan left her seat, which was behind the railing,—which, incidentally, is the only time I know of during the trial except when she took the stand—walked rapidly up to intercept the jury as they were leaving the door, approached them, and as nearly as I can remember the [241] exact words, they were “Merry Christmas to all of you folks.”

Your Honor, that may sound like an innocuous thing. Maybe it is and maybe it isn't. But at the moment it had me very much upset, and the more I thought about it over the holidays the more I am compelled to ask the court to declare a mistrial in this case. I am afraid it is highly prejudicial. Your Honor has tried many cases and you are perfectly well aware, you know perfectly well, as I do, one of the things we try to avoid in these cases is a so-called “Christmas verdict”; that is to say, the question of Christmas holidays entering into a verdict. This case is one of those cases where an incident like that, and I say to your Honor that it is a death case in which sympathy naturally can enter into it. It is a death case against a large corporation. It is a death case in which, admittedly, our engine was going at a high rate of speed, 70 miles an hour, legal, lawful rate of speed, but the jury might—it is a case in which it is a very close question on the facts. Plaintiff has produced two witnesses

whose testimony would leave the inference that at the time the wig-wag was not working, the bell was not sounded, the whistle was not sounded. We have evidence to the contrary, but it is a close question on all issues.

I think the only thing which should be done in this case is to discharge the jury and commence again after the holidays. [242] We can never say how much that could affect the jury. It wasn't just "Merry Christmas." I want to say it was one of those things that will probably leave the impression, "You could make it a Merry Christmas for me." Maybe she did not intend it that way, but it wasn't a question of intent but of what was said.

I was upset at the time. Now I am not upset about it, I am just definite that it would be prejudicial. I think it would be prejudicial to the defendants in this case, and I think——

The Court: Let me state what I understand the facts to be from Mr. Schaeffer, the Clerk, who was standing right here. He says that a great many of those jurors, as I understand it, had reached the doorway and most of those had——

Mr. Schaeffer: A few had gone out, I don't know how many, but Mrs. Shanahan leaned forward and said, "Merry Christmas to you folks," or "Merry Christmas to all you folks" (I don't remember exactly), but I saw her face and it was as if she was just a person wishing Merry Christmas. But she did lean forward from here to, I would say, the desk from the rest of the jurors. One of them, I think, said, "Thanks" or "Merry Christmas to you," but the others I don't think heard it. The

rest of them had gone out, I don't know how many.

Mr. Murman: I didn't hear it at all and I was standing a few feet away. But I checked the law over the Christmas [243] holidays, and if she had discussed the case, anything about the case, that would have been one thing, but as I have noticed in the cases mere salutations which, of course, this was, is not prejudicial if there was nothing in it that discusses the facts or circumstances of the case. I asked Mrs. Shanahan afterwards, "Why in the world did you do that?" You know you are not to talk to the jury." She said, "I heard the Judge say Merry Christmas and I said Merry Christmas. It came out of me before I thought." The poor woman was upset and crying, and I felt terrible, of course. If the law holds that a mere salutation is prejudicial, then this perhaps would follow that category; but there are many cases where a party has just said "Good morning" to a jury, and that is not prejudicial. Nothing prejudicial about being pleasant.

The Court: You have made your point, Mr. Phelps. The way I feel about it is that I said, as I admonished the jury when they left the box, "I hope you have a very happy holiday——"

Mr. Murman: Something like that.

The Court: That statement of hers was, I think under the circumstances, really innocuous. It wasn't intended to influence them in any way. It was made at a time when everybody was saying the same thing to everybody else. I don't feel that I will grant the motion. I think I will deny the motion and go ahead with the trial.

Mr. Phelps: What I want, if your Honor please,

is that the [244] record may show that I had no opportunity to call this to your Honor's attention, that is formally, at the time of the occurrence, but immediately did it in chambers, that I took it up at the very first opportunity afterwards this morning.

The Court: Yes.

Mr. Phelps: I am not going to argue the matter to your Honor. Your Honor has ruled. But I want to call your Honor's attention, that was the impression that was left throughout the holidays. I stand there right alongside of her, and knowing the rules of the court, I can't wish them a Merry Christmas and don't wish them a Merry Christmas. The contrast is there. I don't see how your Honor can escape the fact that no harm can come by starting this case over again, and if your Honor is disposed to grant a mistrial should we shoulder the cost of trying it, the Southern Pacific would do that. I feel that strongly about it. I don't feel that we should do that, but——

Mr. Murman: If Mr. Phelps can find a single case which says a salutation, something which is not a matter of prejudice and no facts involved, that is one thing, but in the case that I could find the mere salutation and pleasantries between the jury or a party and counsel are perfectly proper.

The Court: I feel that way about this, so I will deny the motion.

Mr. Phelps: We take an exception, if your Honor please. [245]

The Court: All right, let's get started.

(The following proceedings were had in the court room before the jury.)

Mr. Murman: I believe Mr. Sublett was on the stand when we terminated last Thursday, your Honor.

LLOYD SUBLETT

recalled, previously sworn.

Cross-Examination

(Continued)

By Mr. Murman:

Q. Officer Sublett, I believe on Thursday, if I remember rightly, you were going to go back to Redding and examine your records about whether or not the engineer did not say to you that he did not see the wig-wag signal. Did you do that?

A. I did. I have my notes and my report with me.

Q. Have you examined them yourself?

A. Yes, sir, I have.

Q. Is there anything in there on that subject?

A. There is.

Q. May I see the report, then?

A. Yes, sir. Would you like to have me show you the place?

Q. Yes, if you will, please. Speak loudly enough so we can hear you. What is this you have in your hand now?

A. That is the notes I took at the time of the accident. I wrote them in my car immediately after talking to Mr. Stainbrook, [246] the engineer, and Mr. Kafer, the fireman.

(Testimony of Floyd Sublett.)

Q. These notes are dated the following day. Those were notes taken the following day?

A. Taken from Mr. DeRosa and Mr. Hewes.

Q. Will you point out in there what portion bears on that subject?

A. I have a notation——

Q. Just point it out to me——

Mr. Phelps: May I see it, too?

Mr. Murman: It is on page No. 3.

A. Yes, sir.

Mr. Murman: Both Mr. Phelps and myself have read this portion which relates to what the engineer told you, is that correct? A. Yes.

Q. That was at the time of the accident?

A. At the time and within a minute, within a matter of minutes after the accident that I went to my car from the engineer and I made the notes.

Q. According to your best recollection, is that about what he said as you wrote it down there?

A. Yes, that is approximately what he said.

Q. Can you read it to the jury as you have it there?

A. In reference to Mr. Stainbrook's statement I have a note that, "Did you notice crossing bell as he was too busy at [247] that time." That was at the time of the collision.

Q. Is that what he said? You just have "at that time." A. Yes.

Q. You added, "At the time of the collision?"

A. That is right.

Q. Did you talk to the fireman?

(Testimony of Floyd Sublett.)

A. I talked to the fireman.

Q. Did he make any statement about the crossing signal?

A. As I understand, he said he didn't see it, he was on the opposite side of the engine.

Q. Have you anything in your notes on that?

A. I don't know whether I have or not. Yes, "I did not see crossing bell. I was on the left side." Those are my notes.

Q. Those are substantially his words, is that correct? A. Yes.

Q. Did you talk to any other persons of the train crew concerning the crossing signal, or were those the only ones?

A. Those were the only ones. I had talked to the conductor around the scene of the accident but I don't believe I questioned him on that. I assumed he was not in any position to see it. I doubt if I did question him about that.

Q. I will return these to you temporarily. I may want to look at them again, so will you hold them handy? A. All right.

Q. I believe you stated that when you found the wreck of the [248] car—can all the jurors see the blackboard?—when you found the wrecked car it was to the west of the main line some 120 or 130 feet beyond the crossing, to the south of the crossing, is that right?

A. West of the main line, yes, sir.

Q. When you looked at the car, Mr. Sublett, did you look at it carefully or just glance at it?

(Testimony of Lloyd Sublett.)

A. I merely glanced at it at first. I did look it over quite thoroughly afterwards.

Q. How long afterwards did you examine it thoroughly?

A. It was before the car was moved.

Q. Same day as the accident?

A. Yes, perhaps within an hour or an hour and a half.

Q. I show you plaintiff's exhibit 7, in evidence, which I think you have seen before.

A. Yes, sir.

Q. A picture of the wrecked car, isn't it? I call your attention to the front, right glass window on the door.

A. Yes.

Q. You see here the window is down. Can you see that? You can see the reflection on the glass and it shows it is down about half the distance.

A. I see the reflection.

Q. Don't you see a line there in the glass running through there? You can see the curved portion. It follows the curved [249] portion of the door frame itself.

A. Looks like glass.

Mr. Phelps: May I see that?

Q. (By Mr. Murman): Having that in mind——

Mr. Phelps: Oh, that is all right.

Q. When you looked at the car was the right window down?

A. Not the right window, no.

Q. Was there another window that was down?

A. No, I do not know of any window that was down.

(Testimony of Lloyd Sublett.)

Q. It is your testimony, then, that the picture here shown of the window being partially down was not the condition as you saw it at the time you carefully looked over the car?

A. Is that the right window?

Mr. Phelps: May I see the photograph?

Mr. Murman: Well, the car was struck——

A. Yes, take a look at it.

Q. (By Mr. Murman): The car was struck, was it not, as it was going from east to west?

A. That is right, it was.

Q. I am sorry. I am sorry. The car was struck on the right-hand side, wasn't it?

A. Yes.

Q. It was the driver's side of the car that was away from the collision? A. Yes. [250]

Q. That would be the left side?

A. That would be the left side.

Q. I am sorry, I had my right and left mixed up temporarily. Calling your attention to this same photograph, that is the left door, isn't that correct?

A. Yes, I took that to be the left door.

Q. Yes, I think that is right.

Mr. Murman: Your Honor, now, in the photograph it shows the window down partly.

Q. Was that window in that condition when you looked over the car?

A. I don't believe it was, sir.

Q. Did you try the door to see whether or not the window could be raised and lowered?

(Testimony of Lloyd Sublett.)

A. No, sir, I didn't. I merely observed it at the time I looked it over.

Q. It is your recollection, is it, that the window was all the way up?

A. That is my recollection.

Q. But you didn't try the window to see if it could be moved at that time?

A. No, I did not.

Q. Did you note the condition of that left door as to whether it was damaged in any way?

A. As I recall, it was damaged. The door was open, could not [251] be closed, that is the left door. The right door was completely damaged. But I am quite sure the left door was dented up considerably.

Q. Dented up in the body portion of the door itself, that is, below the window? [251A]

A. I don't recall the exact damage to it, I am sorry.

Q. How about the light switch in the car itself? Did you check that?

A. The light switch, as I recall, was off at that time. I couldn't see anyone, that is, at the time of my arrival I couldn't find anyone who stated he turned it off or that it was not turned off. I really don't know.

Q. Then, when you arrived there, the tail light was not burning, is that correct?

A. No, it wasn't.

Q. You said that subsequently that same day you came by when a freight train was coming from the north, and at that time this signal was in operation,

(Testimony of Lloyd Sublett.)

the one at the Howard Street crossing, is that correct? A. Yes, that is right.

Q. When you got there was that signal light in operation or did you arrive before the train was there?

A. No, I knew there was a train coming. I was starting north out of Anderson and saw this train coming and I turned around and went back to the signal and waited.

Q. It was coming rather slowly, was it, as freight trains sometimes do?

A. It was coming possibly 40 miles an hour, 45.

Q. You did get here before the train arrived, is that correct. A. I did. [252]

Q. Where were you standing when you observed the operation of the signal as the train approached?

A. I wasn't standing. I was sitting in my patrol car across on the west side of the highway in front of the Standard service station.

Q. On the west side of Highway 99?

A. Yes.

Q. Were you headed south then?

A. I wouldn't say for sure. I believe I was.

Q. Where were you standing, then, on the west side of that Standard service station just about opposite the Howard Street crossing?

A. Just about.

Q. Where you were seated at the west in your car, did you look up the track and see the train approaching?

A. I watched the approach of the train to deter-

(Testimony of Lloyd Sublett.)

mine whether or not the bell started ringing a reasonable distance, when the train was a reasonable distance away.

Q. Where was the train when the bell started ringing, approximately?

A. I couldn't say exactly the point. It was well up into the yard north of—I believe north of the North Street crossing.

Q. North Street crossing—is this crossing at the righthand side of the picture, the map, isn't [253] that correct? A. That is right.

Q. You say it was north of that?

A. Yes.

Q. Do you have any idea how far north? In other words, was it two or three car lengths north of North Street, to the north of the Ferry Street crossing, putting it about right here on the map? Or was it further than that?

A. I couldn't say offhand the exact location. I don't believe it was too far north of that crossing.

Q. You say "too far." A. Well,—

Q. In other words, to get it a little more exact than that, was the train one block further, or less, or more?

A. I could only estimate according to my best recollection as probably near a block or less.

Q. There would be, taking the distance approximately between North Street and Ferry Street, it just came in there to the right? It would be somewhere out here (indicating)?

A. Somewhere out there, yes.

(Testimony of Lloyd Sublett.)

Q. Beyond the right side of the map, is that correct? A. That is right.

Q. Was there anything on this right passing track, that is, the west passing track?

A. Not at that time, no; there was no other train in there.

Q. Then, as the train approached from where it was north of [254] the North Street crossing, you noticed the signal start to operate?

A. Yes, sir.

Q. And your recollection is certain that there was no waiting freight on the west siding here at that time? A. No, I am sure there wasn't.

Q. Now, going back to the engine crew for a minute again, did you have any conversation with either the fireman or engineer as to the sounding of the whistle?

A. They both said the whistle was sounded several times coming into Anderson and it was sounded for that crossing, according to their statement to me.

Q. The statement to you was that it was sounded several times coming into Anderson?

A. Yes, for other crossings as well as that one.

Q. Then it was sounded at the Howard Street crossing? A. Yes.

Q. Do you have notes in there on that?

A. I don't know whether I have or not.

Mr. Murman: May the record show, your Honor, the witness is examining his report that he previously referred to as having been made by him at

(Testimony of Lloyd Sublett.)

the time of the investigation at the scene of the accident.

The Court: All right; it may so show.

A. No, I do not have a note to that effect. [255]

Q. (By Mr. Murman): That is true as to the engineer and the fireman?

A. As to the statement of a whistle, no, sir.

Q. It is your recollection that they stated just as you previously answered my question, is that correct?

A. Yes.

Q. And did they say, either of them say, they saw the car prior to the collision, that is, the car in which the deceased was riding.

A. The fireman——

Mr. Phelps: May it please the Court, for the record I want to object to that as calling for hearsay testimony, not binding on the defendant the Southern Pacific Company. These are not parties, that is, the fireman or the engineer, to this action.

Mr. Murman: They are employees, aren't they?

Mr. Phelps: That is correct.

Mr. Murman: Then, as I understand the witness' testimony, that is a statement made right at the scene of the accident when he first questioned them.

Mr. Murman: Isn't that correct, Officer?

A. Yes.

Mr. Murman: I think it is admissible.

The Court: I think I will allow it.

Mr. Phelps: If you are talking about the res gestae, I think it [256] would be without foundation

(Testimony of Lloyd Sublett.)

because it was at least a half hour after the accident. I know of no case that goes beyond that. I make the point for the objection.

Mr. Murman: Plenty of those. There are even spontaneous exclamations under the cases.

Mr. Phelps: I submit it for the Court's ruling.

The Court: I think it is a little remote. I think, if that be the case, it is too remote to be part of the *res gestae*. The statement wouldn't be binding on the defendant.

Mr. Murman: If the Court please, it is right after the officer got there that you talked to the engine crew, isn't that right?

A. After I got to the engine.

Mr. Murman: How long after you arrived there at the scene?

A. It was after the coroner arrived. It would be perhaps half an hour after I got to the scene of the accident.

Mr. Murman: Is Your Honor ruling then, that the objection should be sustained?

The Court: Yes, I will sustain the objection.

Q. (By Mr. Murman): Now, you said on your direct examination, Officer, that you had known the deceased quite well. I think those were your words?

A. Yes.

Q. How long had you known him? [257]

A. I had known him personally perhaps for twelve or fifteen years.

Q. At the time of his death, how long prior to that time had you seen him last?

(Testimony of Lloyd Sublett.)

A. Well, I used to see him almost every week. I don't recall the last time I actually saw him prior to that. It was probably, could probably have been, perhaps a week or two prior.

Q. Was he in apparently good health when you saw him? A. Yes.

Q. Did you know his age or not?

A. I knew his approximate age.

Q. You knew he was in his fifties, is that correct? A. Yes.

Q. Had you observed him driving on the highway during that 15 year period you mentioned.

A. Yes, I observed him a number of times.

Q. About how often would you say?

Mr. Phelps: I will object to that as incompetent, irrelevant and immaterial; and if it is preliminary, it would be to the same point of my objection which has already been ruled on.

Mr. Murman: No, this is a different point. If there is any objection, I think that would go to the foundation of the question. I can't develop that this witness is an expert. I will reframe the question so there is no mistake about it. [258]

Q. Officer, how long have you been a member of the California Highway Patrol?

A. Since September, 1935.

Q. You said, I believe, you had been stationed in the Shasta area for some time prior to the accident, had you not?

A. I have been stationed in the Shasta area all

(Testimony of Lloyd Sublett.)

that time with the exception of short details away from there.

Q. Just temporary assignments elsewhere?

A. Yes.

Q. Now, it is part of your duties to observe how persons operate their vehicles on the highway?

A. It is.

Q. And you make those observations daily, do you not? It is part of your duties, is it not?

A. Yes.

Q. So as to determine whether or not an operator operating his vehicle on the highway is operating it in a lawful manner, isn't that so?

A. Yes, that is right.

Q. And also in a careful manner? A. Yes.

Q. You have seen Mr. Shanahan, you said, on an average of about once a week during that time you knew him? A. That is right.

Q. When you saw him on those occasions, was he operating a [259] vehicle. Now, then, I imagine you didn't see him always in his automobile, but did you see him operate a vehicle?

A. I saw him occasionally, yes.

Q. When you say occasionally, how often would you say, once a month, once every two weeks, or——

A. That is hard to say exactly.

Q. I don't want it exact. Approximate.

Mr. Phelps: I submit, may it please the Court, all this is incompetent, irrevelant and immaterial.

Mr. Murman: This defense is that this man was operating a vehicle in a negligent manner at the

(Testimony of Lloyd Sublett.)

time of the accident. I think it is competent evidence and can be shown by this witness that he was not that sort of a driver.

Mr. Phelps: You have already ruled on that.

The Court: I have already ruled on that.

Mr. Murman: That is as to the crossing. I am speaking of his general conduct, not the crossing.

Q. (By Mr. Murman): You never did see Mr. Shanahan cross this particular crossing, did you, Officer? A. Not that I recall.

Q. The way you observed him was on the highway? A. Yes.

The Court: I think that is immaterial and I wouldn't pursue it, counsel.

Mr. Murman: All right, Your Honor, I bow to the Court's [260] ruling. I have no further questions.

Redirect Examination

By Mr. Phelps:

Q. Officer, may I see your notes, please?

A. Yes, sir. [260-A]

Q. Officer, you handed me some notes—you have handed me a California Highway Patrol vehicle accident report. Is that the report which you turned in on this accident? A. It is.

Q. Is that the original?

A. That is the original draft of the report.

Q. And does that bear a signature of anyone besides yourself?

A. It bears the signature of my superior officer, Captain Foster.

(Testimony of Lloyd Sublett.)

Q. And yours? A. And myself.

Q. And is this the final report that is filed with the California Highway Patrol on this accident?

A. It is the original report, yes.

Q. And there is a yellow page, is that part of your report, Officer, that is attached to it?

A. That is supplementary to the original.

Q. Your stating in this report——

Mr. Murman: Now, just a moment, if the court please. I am going to object to any reference to any statements made in the report as being heresay, not being binding on the plaintiff, not being within the issues of the case, and certainly counsel can't impeach his own witness.

Mr. Phelps: I am not asking to impeach, if your Honor please. He has gone into the matter here, the window was up [261] or down. Now, I want to go into the matter of showing what his opinion and conclusion was at that time, as recorded at that time.

Mr. Murman: We have already had the witness' testimony and this is the witness' own report; therefore, it is not admissible in this case.

The Court: I think I will sustain the objection.

Mr. Phelps: Very well. I was going to offer the entire report in *office*. I thought perhaps you would stipulate the matter go in——

Mr. Murman: No, I am not going to stipulate.

Mr. Phelps: ——made on the 28th, a report on this accident.

Mr. Murman: You know it isn't evidence unless it is to impeach.

(Testimony of Lloyd Sublett.)

Mr. Phelps: You won't stipulate?

Mr. Murman: No, I won't stipulate. You have the witness here, you can ask him the question.

Mr. Phelps: I will call your attention to the final conclusion, the last sentence of your report. Just read it to yourself.

(Witness reads report.)

Q. Now, officer, having refreshed your recollection from the report itself, is there anything about it which would change your opinion heretofore expressed as to whether or not—your opinion was that the window, the windows of this vehicle [262] were closed at the time of the accident?

Mr. Murman: At the time of the accident, or at the time of the investigation?

Mr. Phelps: At the time of the accident.

Mr. Murman: I submit that calls for a—is purely a conclusion, if the court please.

Mr. Phelps: I will withdraw that.

Q. At the time he made the investigation.

The Court: You had better reframe that.

Mr. Phelps: Very well.

Q. Having reviewed your report, Officer, is there anything contained in your report, is there anything which would lead you to change your opinion heretofore expressed that at the time of your investigation of the Shanahan *car* were closed?

A. According to my report, it was my conclusion the right-hand window was closed.

Q. And as far as the lefthand window is con-

(Testimony of Lloyd Sublett.)

Q. And yours? A. And myself.

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Q. And as far as the lefthand window is con-

(Testimony of Lloyd Sublett.)

cerned, your observation is that at the time you investigated it, your observation was that it was up, is that correct? A. Yes.

Q. Now, then, you were asked about your notes, Officer, and I am only now referring to the portion you read. A. Yes.

Q. And there is this in your notes, "Did you notice," (Stainbrook) "did not notice (the) crossing bell as he was too busy at [263] that time." You recorded that after going to the automobile and sitting down?

A. When returning to the automobile from the engine, the locomotive.

Q. Now, having refreshed your recollection from these notes, can you give us a little more accurately as to what he said in that respect, how he said it?

Mr. Murman: If the court please, the witness has already testified those are substantially the words and counsel asked can you give it more accurately. I submit that is leading and suggestive, it suggests to the witness that what he has given as an answer already is not an accurate answer and I think it is prejudicial and misconduct on the part of counsel.

Mr. Phelps: I will withdraw it. I will submit, your Honor. But I will withdraw the question.

The Court: I don't consider it as misconduct at all.

Mr. Phelps: The point I am getting at is simply this: Having refreshed your recollection from these notes as to what you then recorded, can you tell us—

(Testimony of Lloyd Sublett.)

if you can; if you can't tell us, you can't—just whatever your frame of mind now is, referring back, can you tell us as closely as you can the words that Mr. Stainbrook used on that occasion?

A. As I recall the exact wording, his answer to my question as to whether or not he observed the bell, his answer was "Hell, no, I was too [264] busy."

Q. That is your recollection?

A. That is my recollection of the exact wording.

Q. By the way, officer, you appeared here in response to a subpoena, did you not?

A. Yes, sir.

Mr. Phelps: I have no other questions.

Mr. Murman: No further questions.

Mr. Phelps: May this witness be excused?

Mr. Murman: Yes, as far as I am concerned.

Mr. Phelps: The court will excuse this witness?

The Court: Yes.

(Witness excused.)

Mr. Phelps: Call Mr. Luddon.

JAMES R. LUDDON

called as a witness on behalf of the defendant,
sworn.

The Clerk: Will you state your full name to the court and jury, please?

A. James R. Luddon.

(Testimony of James R. Luddon.)

Direct Examination

By Mr. Phelps:

Q. Mr. Luddon, where do you live?

A. Dunsmuir, California.

Q. By whom are you employed?

A. Southern Pacific Company.

Q. And in what capacity? [265]

A. Rodman in the engineering department.

Q. And as a rodman for the engineering department, it is part of your duties to make the measurements after an accident, for maps, such as used here?

A. Yes, sir.

Q. And is it also part of your duties on such occasions to take photographs?

A. Yes, sir.

Q. All right, now, Mr. Luddon, referring—directing your attention to the accident in which Mr. Shanahan was killed, on December 27, 1948, at Anderson, California, at the Howard Street crossing, did you have occasion to visit the scene of the accident?

A. Yes, sir.

Q. And you remember when it was?

A. It was in the morning of December 27.

Q. That was the day of the accident?

A. Yes, sir.

Q. And did you take some photographs of the scene of the accident?

A. Yes.

Q. Now, first one, the photograph already in, two photographs already in evidence—I show you defendant's exhibit B, which has already been intro-

(Testimony of James R. Luddon.)

duced into evidence, and ask you whether or not you recognize that as a photograph which you [266] took?

A. Yes, sir; I do.

Q. Can you tell us when it was taken?

A. It was taken on December 27.

Q. And now can you tell us where the camera was at the time that picture was taken with reference to the main line track?

A. It was 25 feet from the center line of the main track.

Q. 25 feet which way?

A. On the east side of the track.

Q. Was that by actual measurement?

A. Yes.

Q. All right. And what does it show? Does it show the view down, in which direction down the track?

A. Shows the view to the north.

Q. At a point 25 feet from the main line of the track?

A. Yes, sir.

Mr. Phelps: Now, the jury has already seen it, but may I ask now, having identified the place 25 feet from the tracks, if we may pass it to the jury?

The Court: Yes.

Q. (By Mr. Phelps): I will show you another photograph while the jury is looking at this, and ask you if you can identify that as a photograph that you took?

A. Yes, sir, that was taken 25 feet from the center line of the main track. [267]

(Testimony of James R. Luddon.)

Q. The camera in the same position?

A. Yes, sir, looking at the crossing.

Q. Looking at the crossing itself, looking down onto the pavement to show the condition of the pavement and the crossing, is that right.

A. That is right.

Q. That is the purpose of that one. All right. Now, when was that taken.

A. On December 27.

Q. Same day? And does that correctly portray the scene as of the time when you observed it, took that picture directed down on the crossing?

A. Yes, it does.

Mr. Phelps: I offer that in evidence as defendant's exhibit next in order.

Mr. Murman: No objection.

The Clerk: Defendant's E.

(Whereupon the photograph referred to above was received in evidence and marked Defendant's Exhibit E.)

Q. (By Mr. Phelps): I show you another photograph and ask you if you can identify that photograph?

Mr. Phelps: I will pass defendant's exhibit E, with the court's permission, to the jury, taken looking down on the pavement a point 25 feet from the crossing.

A. Yes, that was taken 25 feet from the crossing, looking north. [268]

(Testimony of James R. Luddon.)

Q. Was it taken on the same day?

A. Yes, on December 27.

Q. And looking in the direction, in the northerly direction towards Redding? A. Yes.

Q. Looking down the track? A. Yes.

Q. All right. And does that correctly portray the view looking up the track in a northerly direction from a point 25 feet from the track?

A. It does.

Q. On the main line track?

A. In the center line of the main.

Mr. Phelps: I offer that in evidence as defendant's exhibit next in order.

Mr. Murman: No objection.

The Clerk: Defendant's Exhibit F, in evidence.

(Whereupon the photograph referred to above was received in evidence and marked Defendant's Exhibit F.)

Q. (By Mr. Phelps): I show you another photograph and ask you if you can identify it and tell us where it was taken and by whom?

Mr. Phelps: The photograph now handed to the jury, with the court's permission, another photograph taken 25 feet in [269] the crossing looking in the northerly direction which the train was coming.

Q. Can you identify that? A. Yes, sir.

Q. Where was that taken and when?

A. It was taken 50 feet from the center line of

(Testimony of James R. Luddon.)

the crossing on December 27, looking at the crossing. It is on the east side of the crossing.

Q. Looking in a westerly direction at the crossing?
A. Yes.

Q. And does that correctly portray the view that you just described as of the time you took it, December 27, 1948?
A. Yes.

Mr. Phelps: I offer that in evidence as defendant's exhibit next in order.

Mr. Murman: No objection.

The Clerk: Defendant's G, in evidence.

(Whereupon the photograph referred to above was received in evidence and marked Defendant's Exhibit G.)

Mr. Phelps: With the court's permission, I hand this picture taken 50 feet from the crossing to the jury for their inspection.

Q. Now, I show you a photograph and ask you if you can identify this photograph?

A. Yes, sir, that was taken 75 feet from the center line of [270] the main crossing, looking at the crossing from the east side, looking west.

Q. 75 feet?
A. Yes.

Q. When was that taken?

A. Taken December 27.

Q. At approximately what time, in the morning or afternoon?

A. In the morning, sir, about 10:30 or 11:00 o'clock.

Q. Now, then, directing your attention to a wig-

(Testimony of James R. Luddon.)

wag signal appearing on that, can you tell us whether or not that is the wig-wag as it was at the time? A. It was; yes, sir.

Q. And at the time you took that photograph the wig-wag was working? A. Yes, sir.

Mr. Phelps: I offer that in evidence as defendant's exhibit next in order.

The Clerk: Defendant's Exhibit H, in evidence.

(Whereupon the photograph referred to above was received in evidence and marked Defendant's Exhibit H.)

Mr. Phelps: We will pass this one, with the court's permission, to the jury, showing the view 75 feet from the crossing.

Q. I will show you another photograph and ask you if you can identify that and tell us when that was taken and where? [271]

A. That was taken December 27, 100 feet from the center line of the crossing, looking in a westerly direction. More at an angle, more of a southwest—

Q. Southwest?

A. Yes, more to—more to the west.

Q. Does that picture portray the view?

A. Yes, it does.

Q. As seen by you on the morning when you took this picture taken from that position?

A. Yes.

Q. Including a large puddle; was that there at the time? A. Yes, sir.

(Testimony of James R. Luddon.)

Mr. Phelps: I will offer that in evidence as defendant's next in order.

Mr. Murman: No objection.

The Clerk: Defendant's I in evidence.

(Whereupon the photograph referred to above was received in evidence and marked Defendant's Exhibit I in evidence.)

Mr. Phelps: Now, then, did you have an occasion to go back——

Mr. Phelps: May I pass this one, defendant's exhibit I in evidence, to the jury for their inspection.

Q. Did you have an occasion to go back at a later date and take other photographs?

A. Yes, sir. [272]

Q. At the scene of the accident?

A. Two weeks later.

Q. What date, do you remember?

A. January 10, sir.

Q. I will show you a photograph and ask you if you can identify that?

Mr. Murman: May I see it?

Mr. Phelps: I am sorry; certainly.

Q. Will you look at that photograph, and I ask you if you can identify where that was taken and when it was taken?

A. That was taken 150 feet from the crossing, sir, in a southwesterly direction.

Q. All right. And as of the time on January 10, 1949, to your observation had there been any change

(Testimony of James R. Luddon.)

in the conditions there at the scene of the accident?

A. No, sir.

Q. The matters shown in the photograph were the same as you observed them on December 27, is that right?

A. That's right, sir.

Q. Except, of course, for puddles or wet?

A. It wasn't raining that day on the morning.

Q. All right. And does that correctly portray the scene of the accident?

A. Yes, sir.

Q. At the time you took the picture? [273]

A. Yes, sir.

Mr. Phelps: We offer that in evidence as defendant's next in order.

Mr. Murman: No objection.

The Defendant's J in evidence.

Whereupon the photograph referred to above was received in evidence and marked Defendant's Exhibit J.) [273-A]

Mr. Phelps: And I show you a photograph and ask that you identify that.

A. Yes, sir, that was taken 200 feet from the center line of the crossing looking in a southwesterly direction there.

Mr. Murman: The same day as the other?

The Witness: It was taken January 10.

Mr. Phelps: I will pass Defendant's Exhibit J taken 150 feet from the crossing. (Passing to jury.)

Q. I have this last photograph which you have identified. Can you show me on there where the in-

(Testimony of James R. Luddon.)

cline to the highway starts? I mean the incline to the railroad tracks.

A. Well, approximately in here some place.

Q. Down here, indicating where the gravel and pavement stops and the gravel starts?

A. Yes.

Mr. Phelps: We offer this in evidence as defendant's Exhibit next in order.

(Thereupon the photograph referred to was received in evidence and marked Defendant's Exhibit K.)

Mr. Phelps: I will pass Defendant's Exhibit K, taken 200 feet from the crossing.

Q. There is another picture before that, which is already in evidence, Defendant's A. Can you tell us when that was taken and what that shows, if you took it?

A. That was taken on December 27, sir. It is looking north [274] at the crossing 100 feet from the crossing.

Q. All right; thank you. Now, Mr. Ludden, I will show you a composite panoramic view and ask you if you can identify that.

A. Yes, sir, it is—that was taken——

Q. What is it and what does it show?

A. It was taken on January 10. I believe I took that 26 feet from the center line of the crossing as it shows north there up the track and at the crossing and the view in between.

Q. Now will you explain to the jury how that was taken?

(Testimony of James R. Luddon.)

A. Yes, sir, set up the camera and first took one photograph and moved the camera and took the second and moved it some more and twisted or turned it and took the third.

Q. Leaving the tripod in the same position?

A. Yes, sir.

Q. Now, then,—and then piecing them together, making a panoramic view, is that right?

A. That's right, sir.

Q. And does that correctly show the scene there as it was observed there on January 10?

A. Yes, sir.

Q. 1949? A. Yes, sir.

Mr. Phelps: We offer that in evidence as Defendant's Exhibit next in order.

Mr. Murman: No objection. [275]

Q. 26 feet from the main line track——

The Clerk: Defendant's Exhibit L in evidence.

(Thereupon panoramic photograph was received in evidence and marked Defendant's Exhibit L.)

Q. (By Mr. Phelps): And finally, Mr. Ludden, I have three photographs here which I will show to you as one group from which that composite was made, the originals and ask you if you can identify——

Mr. Murman: There is no contention they were not made.

Mr. Phelps: I wanted to get the three individual photographs so they could see how the shooting of

(Testimony of James R. Luddon.)

the photographs was done, to place them together and simply to identify them.

Mr. Murman: There is no contention on our part that is not a composite.

Mr. Phelps: All right, fine.

I will ask permission, then, if Your Honor please, to show the jury that composite view taken 26 feet from the crossing.

Q. And these three photographs are the three photographs you took showing, which were used in this composite? A. That's right, sir.

Q. And all taken 26 feet from the crossing on January 10, 1949, and they correctly show the view with the camera in those positions?

A. Yes, sir.

Mr. Phelps: We offer these three in evidence, then, if Your [276] Honor please, separately, separate exhibits.

(Thereupon Defendant's Exhibits M, N, O, photographs, were received in evidence.)

Mr. Phelps: I have no other questions.

Mr. Murman: Does Your Honor wish to take a recess at this time?

The Court: Any cross-examination?

Mr. Murman: Yes, just very brief.

Cross-Examination

By Mr. Murman:

Q. On this one photograph, Defendant's Exhibit H, which shows the signal in operation, you said

(Testimony of James R. Luddon.)

that was taken in the morning, I believe, didn't you?

A. Yes, sir.

Q. About what time in the morning?

A. Well, I couldn't say exactly, sir.

Q. Well, about.

A. It would be about 11:30.

Q. 11:30?

A. Pardon me; it would be 10:30; 10:30 it would be.

Q. Daylight Saving time or Standard time?

A. That is true, so it would be——

Q. This is Daylight Saving time you are giving?

A. Yes, sir, Daylight Saving time.

Q. 10:30 in the morning? A. Yes. [277]

Q. And that shows the sky condition at that time, does it? A. Yes, it does.

Q. Overcast, wasn't it?

A. Yes, it was cloudy.

Q. Now, how did the signal happen to be operating? What was the physical fact of that point, do you know?

A. There was a train coming towards the crossing.

Q. From which direction?

A. From the north, sir.

Q. From the north. And what kind of a train was it, do you remember?

A. Yes, sir, it was a freight train.

Q. The same freight train you took pictures of in these other pictures. A. Yes, sir.

(Testimony of James R. Luddon.)

Q. That is referring to these pictures B and F, is that correct? A. Yes, sir.

Q. I thought that you had said that those other pictures were taken in the afternoon.

A. No, sir, I said these were taken in the morning.

Q. Did you take some in the afternoon?

A. January 10th, or on January 10 I took some in the afternoon.

Q. But all the pictures you took on the day of the accident here were taken in the morning, is that correct? A. That's right, sir. [278]

Q. You're certain of that, are you?

A. That's right, sir.

Q. You have any idea where that train was at the time the signal started to operate as shown there in the picture?

A. I don't know how far that holds.

Q. Now, you have—here is Defendant's Exhibit B showing the train there with the smoke pouring out of the funnel. Was that taken before or after this defendant's Exhibit H was taken?

A. After, sir.

Q. That was taken after? A. Yes, sir.

Q. All right. How long after, do you know?

A. As soon as I could set up the camera. I had to hurry quite a bit.

Q. Now, when the picture, Defendant's Exhibit H, was taken, have you any idea where that train was?

A. No, sir, I was set up at 75 feet from the—the

(Testimony of James R. Luddon.)

bell started ringing and I didn't look to see how far the train was up the track.

Q. When you took that, took the picture then, you didn't look to see where the train was when you actually took the picture? A. No, sir.

Q. Defendant's Exhibit H, you didn't look to see where the [279] train was?

A. No, sir, I didn't look to see where the train was as I took the picture.

Q. And you started, you took the picture as the signal started to operate, is that correct?

A. Yes, sir.

Q. So you can't tell us, then, the location of the oncoming train when you took Defendant's Exhibit H, because you weren't looking at it?

A. Beg pardon, sir, I didn't understand.

Q. You can't tell us the position of the oncoming train when you took Defendant's Exhibit H because you weren't looking at the train, is that it?

A. No, sir, I can't.

Mr. Murman: I have no further questions.

Mr. Phelps: May this witness be excused?

The Court: The witness may be excused, and we will take a ten minute recess. During the recess, ladies and gentlemen, bear in mind the admonition the Court has heretofore given you.

(Recess.) [280]

JAMES R. ROWE

called on behalf of the defendant; sworn.

The Clerk: State your name, please, sir; your full name.

A. My full name is James R. Rowe.

Direct Examination

By Mr. Phelps:

Q. Mr. Rowe, where do you live?

A. Cottonwood.

Q. Where is that?

A. That is about 16 miles north of Red Bluff.

Q. How long have you lived there?

A. Practically four years.

Q. By whom are you employed?

A. By the SP Company.

Q. In what capacity?

A. Signal Department.

Q. In the signal department, what is your position in the signal department.

A. My position in the signal department is to look after automatic signals, automatic wigwags, and everything pertaining to the automatic field of the railroad.

Q. You still have that same position?

A. Yes, sir.

Q. All right. Now, then, directing your attention to the town of Anderson, can you tell us whether or not your job had anything [281] to do with the maintaining and inspection, and so forth, of signals there in the stretch of road including Anderson?

A. Yes, sir.

(Testimony of James R. Rowe.)

Q. How long have you had the job? When did you first go to work in that job which included that section of the road?

A. I believe it was February of 1935, I believe it was—or 1945.

Q. 1945? A. Yes, February.

Q. Directing your attention to December 27, 1948, do you remember that there was an occasion when there was an accident at the Howard Street crossing in Anderson on that day. A. I do.

Q. Directing your attention to that date, can you tell us how much of the railroad, from where to where, did your duties require you to inspect and maintain these signals?

A. Well, my duties is to test that signal.

Q. One moment. I want to know how much of the railroad did you have charge of?

A. I had practically 23 miles.

Q. From where to where?

A. From Hooker to Redding.

Mr. Murman: What was that name?

Q. (By Mr. Phelps): Hooker, isn't that right?

A. That is correct. [282]

Q. Hooker, somewhere south, geographically?

A. That is it.

Q. South of Anderson? A. Anderson.

Q. Mr. Rowe, from time to time I will be asking you a question and if you can, I want you to answer them by using geographical directions rather than your railroad directions, which I know you are familiar with, but try to answer them, if you can,

(Testimony of James R. Rowe.)

north and south, having in mind that north is toward Redding from Anderson and south is toward Red Bluff, will you do that?

A. I will do that, sir.

Q. Now, Mr. Rowe, so that included within the signals which were under your care and supervision was the signal in Anderson at the Howard Street crossing, is that right?

A. Yes, sir.

Q. And the other automatic signals in Anderson?

A. Yes, sir; there are two of them.

Q. All right. Will you please explain to us what type of signal there was at the Howard Street crossing?

A. It is what is known as the wigwag system.

Q. And I show your Defendant's Exhibit L, which is a panoramic view of the crossing. Will you point out the wigwag?

A. This is it here.

Q. What is this that I am pointing to?

A. That is a box with batteries and relays. [283]

Q. Does that have anything to do with this signal?

A. Yes, that operates the signal. It furnishes the battery and stuff to operate the signal.

Q. Where is the light in the wigwag?

A. Right there (indicating).

Q. What is this up above?

A. Just a bell.

Q. To attract attention?

A. Yes, sir.

Q. Where is the bell?

A. The bell sets right at the back side, the other side of that what-you-call-it. It is a clapper bell.

(Testimony of James R. Rowe.)

Q. When it is activated by a train, it rings and the light goes on? A. That is right.

Q. Now, then, will you tell us, please, how that signal is operated. What happens when a train is within the circuit that causes it to ring?

A. Well, you take a southbound train, when it enters into the train circuit from that bell, it is 4600 feet, it starts that bell operating by shorting the circuit of it. What I mean by shorting, see, it drops the relay.

Q. First, what do you mean by shorting the circuit?

A. That is when a train enters the certain block we have.

Q. How does a train short it? You will have to explain that [284] to us.

A. A train shorts it by traveling over the track. We have insulated joints that divides one rail from the others, and those are all insulated with a fiber, and the moment a train passes over the fiber joint, it automatically shorts that circuit out.

Q. Is that a current of electricity that flows——

A. Through the rail.

Q. ——from the battery box here?

A. Yes.

Q. Comes through the track? A. Yes, sir.

Q. It went out the distance of your circuit, 4500 feet, 4600 feet, then flows back the other rail?

A. That is it.

Q. And comes back the rail, then enters again——

(Testimony of James R. Rowe.)

A. Into the battery.

Q. Into the battery box? A. That is it.

Q. Now then, that is a continuous flow of electricity, is that right?

A. Yes, sir, continuous flow.

Q. Is that by batteries or what, by current from the rails?

A. It is what we call an Edison wet cell battery.

Q. So that is a wet cell battery that puts the current through [285] the rail and it comes back again? A. That is right.

Q. Now, then, if for any reason there is a short created across the rails, what happens?

A. The signal automatically at Howard Street goes to ringing.

Q. All right. First what happens? What do we mean by a "short"?

A. I will explain it to you. When you short a track, it drops what we call a track relay.

Q. What is that?

A. That is a round, glass rigging with a bunch of fingers on it known as pick up and drop off contacts. Our signal works on a pickup circuit. When it is normal, no trains in the circuit, it has a flowing battery from one line down through the relay and back up the other side of the battery, and as soon as a train hits that circuit, or an iron is laid across the line or rail, that drops the relays in the pickup battery or the drop contact, and that starts the signal a-working.

Q. Now, is that, if I understand what you said,

(Testimony of James R. Rowe.)

the battery in the battery box here? A. Yes.

Q. Which flows current through the rail and comes back to the battery box? A. Yes.

Q. In addition to the flow through the rail, that current itself [286] does something? It holds——

A. The relay in normal position.

Q. It takes that current, makes that current flow continuously through the track and holds that as well to be sure that the wigwag won't work.

A. That is right.

Q. Then when the current is broken for any reason—— A. It stops.

Q. ——or some current goes over the circuit or for any other reason at all, the current no longer holds that relay up, it drops it?

A. That is right.

Mr. Murman: If the Court please, this is certainly leading and suggestive.

The Court: I think it is.

Mr. Murman: It is really in the interest of time, but counsel is going on and on.

The Court: I think you might lead the witness somewhat in this kind of testimony.

Mr. Phelps: I think there is no question about how it operates.

The Court: All right, proceed.

Mr. Phelps: I don't want to——

Mr. Murman: I realize that, but you are just going on and on and on. [287]

Mr. Phelps: I am trying to explain.

Q. It holds that up and when the current is broken it drops down. A. Yes.

(Testimony of James R. Rowe.)

Q. When that drops down, then, and the current is broken, what else happens?

A. There is a pickup battery or pickup contact, drop-away contact flows out through and up to the wigwag and starts the wigwag working.

Q. Is that another flow of current? There is through the rail——

A. It has an individual battery for the bell which is hooked up with this track relay. It is an individual battery, an Edison storage battery.

Q. Is that a separate battery?

A. That is a separate battery. It is an 88 volt battery.

Q. So that when the relay drops down, it then commences the current flowing from the separate battery into your wigwag is that right?

A. That is right.

Q. Then the separate battery operates a bell and wigwag and the light? A. That is right.

Q. That question, what means do you insure that the batteries are kept charged up? [288]

A. We have a 110 circuit, production of P.G.&E., that runs through the cable, runs a trickle charge that keeps the batteries in continuous charge 24 hours a day.

Q. Does that also apply to the other battery?

A. Not the track battery, no, just the wigwag battery?

Q. The one battery, that is, the wet battery?

A. Yes, sir.

Q. When you are inspecting, do you in the ord-

(Testimony of James R. Rowe.)

inary course of business, and did you on this occasion, immediately prior to this accident on December 27, 1948, what inspection——

A. My instructions are to do——

Q. No, what did you do?

A. All I done on that day was to test the battery. I shut the track relay out to drop the track relay.

Q. First let's get to the—I show you three pages there and ask you if you can identify those.

A. That is my shut tests, hours and days I make my tests on.

Mr. Murman: May I have the answer to that last question?

The Court: Read the answer.

(Answer read.)

Q. (By Mr. Phelps): Whose handwriting is that? A. My handwriting.

Q. Is that a report and record when you tested that signal on Howard Street?

A. Yes, sir. [289]

Q. From the 13th day of December through the 27th day of December, is that right?

A. Yes, sir.

Q. From that, and using it to refresh your recollection, can you tell us whether or not you inspected that signal on Howard Street on every working day from the 13th of December on, taking that as a start? A. Yes, sir.

Mr. Murman: Just a moment. The record is there was no inspection between the 24th and 27th.

(Testimony of James R. Rowe.)

Q. (By Mr. Phelps): The 25th was Christmas, was it? You didn't work that day?

A. No, I didn't work on Christmas.

Q. The 26th wasn't a working day?

A. No.

Q. The next working day after the 24th of December was the 27th. A. 27th.

Q. And you did inspect it on the 27th at 9:20, after the accident?

A. Somewhere around 9:00 o'clock is all I can say.

Q. Whatever the time is recorded there?

A. That is right.

Q. You don't remember exactly. At any rate, that does show the times you did inspect that, and will you tell us in your [290] ordinary making of those inspections, what you did use and what tests were made? This is not—I am not directing your attention and don't want you to tell me now—I am not now directing your attention to after the accident. I am now directing your attention to the regular maintenance tests which you made before the accident.

Mr. Murman: That is indefinite, if the Court please, because it isn't sufficiently covered there. I would suggest, if I may, that we start with the last time he tested it before the accident which would be the 24th, rather than just going into a series.

The Court: As I understand it, the witness testified he tested it every working day.

(Testimony of James R. Rowe.)

Mr. Phelps: I am now asking what he does when he tests that in the regular working day.

The Court: You understand the question?

A. Yes. I shut the track out, go over and look to see whether or not the bell is ringing and the light working. And that is my test, and I go up and look the mechanism over to see it is in working [291] shape.

Q. And when you first came up, where did you go?

A. Looked in the mechanism of the wig-wag.

Q. That is on top of the pole?

A. On top of the pole, yes, sir.

Q. Did you do anything with reference to fixing the batteries?

A. We take our battery readings every day, storage batteries, in the case for the bell.

Q. And checked to see they are charged up?

A. Yes, sir.

Q. And do you from time to time replace those batteries?

A. We have never replaced batteries since they was put in new.

Q. Always been charged up?

A. Always been charged up.

Q. No necessity for replacing.

A. No necessity.

Q. All right. Now, that is before the accident. Now then, Mr. Rowe, did you learn there had been an accident on the Howard Street crossing in Anderson on December 27?

A. Yes, sir.

(Testimony of James R. Rowe.)

Q. About when did you learn that?

A. It was about 8:05 in the morning when I went down to the depot.

Q. Where, what depot?

A. Cottonwood.

Q. Now, what did you do. [292]

A. Got down there to get my morning's lineup so I could travel over the road by motorcar.

Q. What did you do after you learned——

A. After that, the light engines went by, I proceeded towards Cottonwood, Anderson from Cottonwood.

Q. That would be in a northerly direction?

A. Northerly direction.

Q. You proceeded—how did you proceed?

A. On the motorcar up the track.

Q. That is a little mechanical machine?

A. Motorcar.

Q. Motorcar? A. Yes, sir.

Q. Gasoline motor. A. Gasoline motor.

Q. Runs on the main line, does it?

A. Runs on the main line.

Q. Now, then, when you—and then did you eventually arrive at Anderson?

A. I arrived at Anderson after all the trains went by.

Q. And had to wait for a passenger train to go by? A. Yes, had me blocked.

Q. Have to go into a siding, is that right?

A. I was at the Kulp, I was in the siding west of them.

(Testimony of James R. Rowe.)

Q. All right, then, when you arrived, what did you do? [293]

A. When I arrived I immediately—the scene of the accident was at Howard Street crossing. I took my motorcar off the crossing, walked over to the—looked at my battery and, oh, I know what it is—relay box there for the shunt box there, see that it wasn't broken.

Q. That is that other white box?

A. On the end of the point of the switch.

Q. Oh, where is that?

A. That sets back farther.

Q. Could you see that?

A. No, that has something to do, if it was broken, make the signals ring. I looked from there, come immediately back to my bell, opened it up, and shunted the bell out with the speedcop, and the corner was there and I made the shunt tests on that—Mr. Sublett.

Q. Before making those tests with the speedcop and the coroner, had you done anything, made any tests before that?

A. No, none whatever.

Q. With respect to the signal.

A. Nothing whatsoever.

Q. So that as far as you know it was in exactly the same condition?

A. When I tested it.

Q. When you tested it. Now then, when you made those tests, what did you do and what [294] did you observe?

(Testimony of James R. Rowe.)

A. When I make those tests, just always shunt that relay.

Q. And did you do that on that occasion?

A. We have a cord about that long (indicating) with two clips on it, reach in there, clip on to your relay, on to your pole sides of the relay, that takes the relay away, takes the battery away from the relay, and the moment you do that the bells automatically start working.

Q. What did it do on that occasion?

A. As soon as I did that, put the shot on, I walked around where I could see the light on my bell, the light was burning and the bell ringing.

Q. The wig-wag was oscillating?

A. The wig-wag was working.

Q. Now then, did you do that more than once?

A. No, just once, just a day's routine. Figure it works once, never failed, it would still work.

Q. Did you make any inspection on top of the pole?

A. No, I didn't go up on no pole, just on the wig-wag, it was, looking at the mechanism open and you can see the mechanism.

Q. And the mechanism you opened, is this the mechanism for the bell? A. The mechanism.

Q. And when you looked at that, did you see anything wrong? A. Nothing.

Q. And did you check the batteries? [295]

A. Yes, sir, I checked my batteries.

Q. Were they charged up?

A. Yes, they were charged up.

(Testimony of James R. Rowe.)

Q. And from your observation and as a result of your tests on the morning of the accident, did you find anything wrong with that wig-wag signal?

A. None whatsoever.

Q. Did it require any repairs?

A. No, sir, none whatsoever.

Q. Did you make any repairs?

A. No, sir.

Q. And did it thereafter continue in service without repair? A. Yes, ever since.

Q. Now then, and can you fix the time, will you fix the time from the record as to when that test was made on the 27th?

A. At 9:20 a.m. Monday morning.

Q. All right. Now, then, Mr. Rowe, what is it that causes the signal to cease to operate after the train had passed over the crossing and out of the crossing?

A. Well, out of that section, a section with insulating joints, the moment you get over these insulating joints, the relay will pick up again.

Q. When it goes over the insulating joint, the circuit is then open again and the juice then flows through the rails and that picks up the relays.

A. The circuit is closed. [296]

Q. The circuit is closed; I think I used the wrong term. At any rate, the current is going normally——

A. Stops the bell.

Q. Where is that mechanism—to cease to operate—where is that on this crossing?

(Testimony of James R. Rowe.)

A. That is about, as near as I can remember about six feet north of the Howard Street crossing.

Mr. Murman: What is that?

Mr. Phelps: Six feet north of the Howard Street crossing, is that what you said?

A. Yes, just about six feet.

Mr. Murman: That is where it cuts out?

Mr. Phelps: Cuts out, yes.

Q. All right. Now then, on the diagram here we have shown three tracks, the one track here, which is west of the—geographically west of the main track—has been indicated as a passing track. Are you familiar with that track?

A. Yes, sir.

Q. Now, down on North Street there are—at the time of the accident you had your flashing light indicators, is that right? A. Yes.

Q. Now, will you tell us whether or not the flashing indicators will be activated and will be flashing off and on when a freight train has pulled in from the northwesterly direction, pulled in and has cleared the Howard Street crossing so that [297] some cars are still, just a little south of the Ferry Street crossing, the other cars remain and continue over the North Street crossing, blocking the North Street crossing, will you tell us whether or not the flashing light indicators on North Street will be activated when a train is blocking that crossing?

A. Yes, sir, the flashers will automatically ring as long as that crossing is blocked.

(Testimony of James R. Rowe.)

Q. And what happens when the freight train clears that North Street crossing.

A. She quits ringing.

Q. So that the purpose of the North Street light is to warn that the North Street is either blocked, or a train on it? A. That's it.

Q. Now then, in the same station with the train on the siding blocking North Street, but not blocking Howard Street, will the—will the design of those wig-wags, will the wig-wag on Howard Street operate?

A. Yes, sir.

Q. Will the wig-wag on Howard Street operate after the train has cleared the crossing on the siding?

A. If it is long enough, yes, it will, but as long as it is covered that other crossing up there, that bell will ring.

Q. I am now talking about after it has cleared the Howard Street crossing, after clearing this crossing. A. Going west or north? [298]

Q. Going north.

A. Going south that will still ring as long as that is on the crossing siding.

Q. You mean the North Street lights will still ring? A. Yes.

Q. But the Howard Street crossing will cease to ring, is that right?

A. Well, cease to ring, that's right.

Q. So that the Howard Street crossing wig-wag will cease to ring just as soon as the train on the

(Testimony of James R. Rowe.)

main line, or the siding, will clear that crossing——

A. On the siding 60 feet before it clears.

Mr. Murman: If the court please, this is leading and suggestive. I am reluctant to call the court's attention to it, but it is going on and on and on.

Mr. Phelps: I didn't get the answer.

The Court: His answer was—read the answer.

(Answer read.)

Q. (By Mr. Phelps): 6 or 60 feet?

A. 60 feet.

Q. One other thing I didn't mention, ask you about, is there any difference in effect, Mr. Rowe, from making the test by shunting across your relays and a train short circuiting by being within the block?

A. None whatsoever. [299]

Q. Does it make any difference so far as that relay operating, Mr. Rowe, as to where within the circuit it is shorted out?

A. Makes no difference where it is in the short.

Q. So that it is shorted out any place?

A. Any place.

Mr. Phelps: Incidentally, if your Honor please, I would like to offer in evidence the inspection reports and I should like to do so.

Mr. Murman: No objection.

The Clerk: Defendant's Exhibit P, in evidence.

(Whereupon the inspection reports referred to above were received in evidence and marked Defendant's Exhibit P.)

(Testimony of James R. Rowe.)

Q. (By Mr. Phelps): Mr. Rowe, having in mind the test made by you after the accident and findings which you made with the wig-wag oscillating, that the light was illuminated, that the bell rang when you shunted this across the relays, is there anything which you know could have, which would—could be wrong with that signal—wig-wag signal——

Mr. Murman: Just a moment, if the court please——

The Court: Let him finish the question.

Mr. Murman: The witness started to answer it. I am sorry, but I had to interrupt the witness, he was starting to make an answer.

Mr. Phelps: I will start it over again.

Q. Mr. Rowe, don't answer this question until Mr. Murman has [300] had a chance to object. I ask you on this morning of this accident from your observations of the tests that you made, having shorted across the—shorted the circuit across the relays, having observed that the signal oscillated, that the light lit, that the bell rang, and having then climbed up and inspected the mechanism of the bell and found nothing wrong with that, is there anything that you know of from your experience as signal maintainer could have been wrong with that signal, a matter of two hours or two and a half hours before and not wrong with it at the time when you made your observation?

Mr. Murman: It is objected to as leading and suggestive, invading the province of the jury, as-

(Testimony of James R. Rowe.)

suming something not in evidence, and certainly not binding on this plaintiff.

The Court: I will overrule your objection.

Q. (By Mr. Phelps): The objection was overruled; do you have the question in mind?

The Court: Read the question.

(Question read.)

A. I don't see how anything could be.

Q. (By Mr. Phelps): Very well. Now, one other thing. You mentioned a point where the signals go off. Do I understand that that is—will you state whether or not that signal goes off when the first car of the train goes over, or the last car——

A. The last car. [301]

Mr. Phelps: I have no other questions. You may cross-examine.

Cross-Examination

By Mr. Murman:

Q. Now, Mr. Rowe, you say you know of nothing. Isn't it a fact that this signal was out of order on several occasions before this accident?

A. Not since I have been maintaining that district.

Mr. Phelps: I will object. The answer is in, but so that I may be consistent, I object to that, if your Honor please, as incompetent, irrelevant and immaterial——

The Witness: Never was out of order.

(Testimony of James R. Rowe.)

Mr. Phelps: And also that it wasn't repaired and so forth——

Q. (By Mr. Murman): ' You mean by that at the time you have been——

Mr. Phelps: May I have a ruling?

The Court: I will overrule your objection.

Q. (By Mr. Murman): Do you mean from the time that you have been on duty here on the Shasta Division on this particular 23-mile strip of track, never had to repair that signal?

A. No, sir, never had.

Q. Never had to repair it——

Mr. Phelps: The record will show my running objection to this line of questions.

The Court: Yes.

Q. (By Mr. Murman): No reports have ever been made that the signal was out of order? [302]

A. No reports.

Mr. Phelps: Add to that, if your Honor please, it would be hearsay, and ask that the answer go out.

Q. (By Mr. Murman): Now, Mr. Rowe, after the accident occurred, you say that at the time of the accident there was a northbound freight on the—a passing freight on the west track?

A. As I understand it, yes, sir.

Q. Now, after that northbound freight approached this crossing of the main line, in order to take the switch here and go on the west siding, would it have activated this wig-wag if it had been working properly?

(Testimony of James R. Rowe.)

A. Until it got over the insulating joint 60 feet west of the bell—north of the bell.

Q. North of the bell. How far down the track?

A. 3600 feet.

Q. 3600 feet. In other words, 3600 feet to the south of the crossing the oncoming train activated the signal and 4600 feet to the north of the crossing?

A. Yes, sir.

Q. Why the difference?

A. There is an overlap of two bells.

Mr. Phelps: I object to that as already——

Q. (By Mr. Murman): Overlap of two bells, the bell at the Howard Street and the one at North Street? [303] A. Yes, sir.

Q. Would the 3600 feet to the south activate the North Street crossing at the same time?

A. At the same time.

Q. As the Howard Street? A. Yes, sir.

Q. And vice versa? A. Vice versa.

Q. All right. Now, as this train, this freight train, this 100-car freight train they had on the siding went off the main line on the switch and passed the 60 feet point north of the crossing which shut off the wig-wag, what happened in your relays when that took place?

A. When it gets in clear, the one on the North Street and this one will stop ringing.

Q. So that the train is still activating the flasher up at North Street, but the wig-wag stops?

A. Yes.

(Testimony of James R. Rowe.)

Q. And the train itself going on the siding stops this wig-wag at Howard, is that correct?

A. After it gets past the joints.

Q. After it gets past the joints. In other words, the actual operation of the train past the joints shuts off the wig-wag at the Howard Street point?

A. Yes. [304]

Q. So that—is that starting and stopping in the nature of throwing a switch in effect when it starts to open the switch, and when it stops in closing the switch; is that right? A. That's it.

Q. So that the train, in a sense, just does the switching operation in the relay?

A. Same as you work for a light.

Q. On the relay system the train acts as pressing the button to turn the light off and on?

A. Yes.

Q. Now, would the freight having turned the signal off as it got past here, how did that wig-wag, having been activated as in fact it had been activated at the time of the accident, by the oncoming passenger train?

A. From back here, from hitting that track circuit it automatically starts the wig-wag working.

Q. The oncoming train from the north would have acted to press the button, so to speak?

A. Yes.

Q. And as I understand it, all the tests you made, you yourself never placed anything across the rails, only at the relays?

A. At the relays.

(Testimony of James R. Rowe.)

Q. Whereas the train itself when it presses the button, so to speak, it presses on the track—— [305]

A. Yes, sir.

The Court: We will take a recess now until 2:00 o'clock. Ladies and gentlemen, bear in mind the admonition I have heretofore given you.

(Whereupon an adjournment was taken until 2:00 p.m. this date.) [305A]

December 27, 1949, 2:00 o'Clock

JAMES R. ROWE

resumed the stand on behalf of the defendant.

Cross-Examination

By Mr. Murman:

Q. Mr. Rowe, as I understand Defendant's Exhibit P, this is your own record of the tests that were made, is that correct? A. Yes, sir.

Q. Each one of these tests was made right at the relay? A. Yes.

Q. At no time did you ever go north of the track or south of the track from the crossing in making the tests?

A. We do if the shunt is in the switch position. I have made the same test. We do that quite often on the road.

Q. That is right at the vicinity of the crossing?

A. Yes.

Q. But apart from the vicinity of the crossing,

(Testimony of James R. Rowe.)

you have never gone south of the track or north of the track to make the test?

A. Yes, quite often, but when we get away from there we can't see the bell. You can hear the bell but you can't see it.

Q. Each one of the tests shown in this record for December, 1948, is a shunt test, isn't that right?

A. Yes.

Q. That is, they were tests you made right at the relay box, [306] isn't that right? A. Yes.

Q. The last test you made before the accident is shown here to be December 24, 1949, at 8:45 or 8:55? A. 8:55.

Q. The signal 2473 is the one in question in this case? A. 71.

Q. The time for the 2471 is 8:45?

A. Yes, sir.

Q. So you tested that at 8:45? A. Yes, sir.

Q. That was on Christmas Eve of 1948 in the morning, 8:45? A. Yes, sir.

Q. Then the next time you tested that same signal was not until 9:20 a.m. of December 27, 1948? That would be three days later?

A. Two days. Saturday, Sunday and Monday morning.

Q. But you tested that on Saturday morning?

A. No, Friday.

Q. Did Christmas come on Saturday?

A. We didn't work Saturday.

Q. Regardless of that, it was tested at 8:45 in the morning, the morning of the 24th?

(Testimony of James R. Rowe.)

A. Yes.

Q. Then not again until 9:20 in the morning of the 27th? [307]

A. Yes, sir.

Q. That is the fact?

A. Yes, sir.

Q. In the meantime, for that period that no tests were being made, the trains were operating on their regular schedule, weren't they?

A. Yes, sir.

Q. There was nothing done at the crossing to change the crossing? It was still the same crossing?

A. Yes.

Q. You weren't present when the collision occurred, were you?

A. No, sir.

Q. I believe before lunch you told us at no time during those four years that you were there was the signal out of order?

A. Not that I recall, no, sir.

Mr. Phelps: The record will show my objection to this line of questioning?

The Court: Yes.

Q. (By Mr. Murman): Don't you recall, as a matter of fact, three or four months before this the signal was out of operation an entire day?

A. No, I do not.

Q. You don't know that? If that lack of operation occurred, and occurred on any day excepting Sunday, it would be a working [308] day, wouldn't it?

A. Yes, sir.

Q. You testified, if I understood you, you tested it every working day?

A. Yes, sir.

Q. You have put in evidence here, or your coun-

(Testimony of James R. Rowe.)

sel has, these records to show that from the 27th through to the 31st of December, 1948, you made shunt tests every day with the same results, that everything was O.K., isn't that right?

A. Yes, sir.

Q. Don't you know two days after the accident the signal was not operating until a locomotive southbound approached right there at the Howard Street crossing?

Mr. Phelps: Objected to, irrelevant, immaterial, what was done on other occasions.

Mr. Murman: Well, they have put it in evidence here.

The Court: That is asking something after the accident?

Mr. Phelps: After the accident.

Mr. Murman: They have put it in the record to show it was in good operating order. This goes to the evidence which they have submitted.

Mr. Phelps: If your Honor will recall my offer in this regard—if there was any question about it, I would like to have the record correctly reflect it—it was submitted, testimony, from the 13th to and including the date of the accident, [309] the 27th, and it happens that the remaining inspections appear on the same day, but it wasn't offered to show any inspection after that.

Mr. Murman: I misunderstood the offer, then. I thought it was to show a continuous proper operation.

The Court: I consider something that happened

(Testimony of James R. Rowe.)

three or four days later entirely irrelevant and immaterial.

Mr. Murman: Yes. As long as that is clear, I will not press it. I have no further questions of this witness.

Redirect Examination

By Mr. Phelps:

Q. Just one: Mr. Rowe, when a train is within the block, within the circuit, in what fashion does it short circuit it? How does it do that? Where does the current go?

A. The current goes back to the wheels, to the battery.

Q. The current is shorted up through the wheels, through the axle, and down again?

A. Yes, sir.

Q. That shorts it? A. Shorts it out.

Q. Now, then, if they have a short on the tracks, that causes the relay to drop and starts the wig-wag in operation? A. Yes.

Q. So that if there is a short the wig-wag will operate instead of the otherway around? [310]

A. Why, anything, a bar of iron or a tractor crossing across with steel cleats, will short the track out.

Q. When you make this test with a shunt, can you tell us whether or not the effect is the same?

A. Absolutely the same.

Mr. Phelps: No further question.

(Testimony of James R. Rowe.)

Recross-Examination

By Mr. Murman:

Q. That is, it is the same as far as you know, but at the time of shunting that box, you didn't necessarily have a train coming down the track?

A. No.

Q. Don't necessarily have another train on the siding? A. No.

Q. Don't necessarily have the tracks wet from rain? A. That has no effect on it.

Q. I mean, when you shunt it out, when you say that is the same thing, that is your own decision? A. That is no difference.

Q. Isn't it a fact electrical current passing through the rails in one direction and back again gets resistance one way?

A. I think so, but it is maintained so we don't lose about 1-100th of a volt through that circuit.

Q. That may be, but there is a difference in the current, running current all the way over the track and back again as between shunting that relay right at the signal? There is a [311] difference in the shunting of the signal?

A. Practically no difference.

Q. Well, practically——

A. There is no necessity shunting it way up the line. You get the same effect regardless whether or not you shunt it on the track or relay.

Q. If the signal is working properly?

(Testimony of James R. Rowe.)

A. Yes.

Mr. Murman: That is all.

Redirect Examination

By Mr. Phelps:

Q. If it is working properly, you get the same effect?

A. That is right.

Mr. Murman: So far as you are concerned?

A. That is my job, to tell whether they do work.

Mr. Phelps: No other questions.

Mr. Murman: No further questions.

Mr. Phelps: You may be excused:

JESSE A. STAINBROOK

called on behalf of the defendant; sworn.

The Clerk: State your full name, please, sir.

A. Jesse A. Stainbrook.

Direct Examination

By Mr. Phelps:

Q. Where do you live, Mr. Stainbrook? [312]

A. Dunsmuir, California.

Q. How long have you lived in Dunsmuir?

A. 33 years.

Q. By whom are you employed?

A. The Southern Pacific Company.

Q. In what capacity?

A. Locomotive engineer.

Q. How long have you been employed by the

(Testimony of Jesse A. Stainbrook.)

Southern Pacific Company, including your service as a fireman? A. Since 1916.

Q. When were you promoted from fireman to locomotive engineer? A. In 1925.

Q. Prior to that did you have any experience in and about in the engine service, or is that the extent of your experience? A. That is it.

Q. That is it? How long, then, have you been running a locomotive engine? Some period of time?

Mr. Murman: 43 years, then.

Mr. Phelps: Well, I had in mind part of the time of fireman—I will just ask the question:

Q. When you are a fireman, are you breaking in as a locomotive engineer, is that correct?

A. Yes, sir.

Q. So that over a period of time you are running an engine [313] when you are actually a fireman? A. Yes.

Q. All right, then, Mr. Stainbrook, where has your experience in the engine service for the Southern Pacific Company been, on what division?

A. The Shasta Division.

Q. Is that the division where Anderson is?

A. Yes, sir.

Q. Are you familiar, then, with the run from Anderson to Gerber? A. Yes, sir.

Q. And from Dunsmuir to Gerber?

A. Yes.

Q. Now, then, I direct your attention, Mr. Stainbrook, to December 27, 1948, and can you tell us whether you were an engineer on any particular

(Testimony of Jesse A. Stainbrook.)

train on that day? A. Yes, sir, on train 13.

Q. What is train 13?

A. Passenger train.

Q. Do you know the name of it? Does it have a number, name, or do you know, or do you know its just as 13?

A. For our part of it, it is the train of 13, the schedule.

Q. You were locomotive engineer on that train?

A. Yes, sir.

Q. Where did you go on duty? [314]

A. At Dunsmuir.

Q. Where did you terminate your duty that day?

A. Gerber.

Q. That is some distance south, or railroad west of Anderson, is that correct? A. Yes, sir.

Q. Mr. Stainbrook, when I ask you some questions about this, I know you are used to using your own terms of east and west. Now, will you try to use north and south, because that is the terminology we are using in this trial so far and the terminology the jury uses, so will you try to use north in the direction of Redding from Anderson and south in the opposite direction?

A. Yes, sir.

Q. As you were operating your engine out of Dunsmuir, do you remember how many cars you had? A. 15.

Q. 15? What type cars?

A. Passenger cars.

(Testimony of Jesse A. Stainbrook.)

Q. And what was the number of the locomotive?

A. 4431.

Q. Now, then, on that day as you were coming out of Dunsmuir and went on duty, did you make any tests of the brakes of your train? Were there any tests made? A. Yes.

Q. What tests were those? [315]

A. Before we leave the station we are required to make an air test of the train. After that test is made, and if the brakes are working properly, we are to release the brakes, and if they release properly, then we are allowed to go as far as their working is concerned.

Q. Was that done on this occasion before you left Dunsmuir? A. Yes.

Q. Now, then, as you were continuing and handling this train on from Dunsmuir south to Redding and up to the point of the accident at Anderson, did you have occasion between those two points to apply and use your brakes in normal course?

A. Yes, sir.

Q. Can you tell us whether or not your brakes operated properly as you applied them?

A. They did.

Q. Can you tell us whether or not your brakes and equipment were in good operating condition?

A. Yes, sir.

Q. As you left Redding, do you remember whether you were late or on time?

A. We were a few minutes late.

Q. Approximately how many, as you recall?

(Testimony of Jesse A. Stainbrook.)

A. Approximately 25 minutes late.

Q. You were on Daylight Saving Time?

A. Yes, sir. [316]

Q. And so that the difference from your scheduled time to your Daylight Saving Time was what is known as one hour runway, is that right?

A. Yes.

Q. Directing your attention back to the time that you were approaching Anderson, can you tell us whether or not, as you approached the town of Anderson, whether or not you sounded your whistles, any whistles, crossing whistles?

A. I did sound the whistles.

Q. All right, and where did you sound those crossing whistles?

A. We commenced sounding the whistles about a quarter of a mile north of Anderson and then continued all the way through.

Q. By north of Anderson, north of the North Street crossing at Anderson?

A. North of the Shell crossing.

Q. What is the Shell crossing?

A. It is where a Shell station, oil station, is just across the track from the highway.

Q. Is that a crossing north of the crossing shown on this map, or is it shown on this map? Will you step down to make sure you understand this map?

(The witness went to the blackboard.)

Mr. Phelps: I will explain this to you: The map shows the station, and then there is a crossing

(Testimony of Jesse A. Stainbrook.)

here at Howard Street, the one where the accident happened. Do you understand [317] that?

A. Yes.

Q. (By Mr. Phelps): Then there is a little crossing here at Ferry Street, and then there is a crossing at North Street with a store, and are there any more crossings north of that, not shown on this map?

A. The Shell crossing would be considered to the north of that as shown on the map.

Q. From that point on, did you or did you not continue to make crossing signals?

A. I did continue to.

Q. Now, then, can you give us your approximate speed as you were going through the town of Anderson and opposite the station and up to the time when you applied your brakes?

A. It was about 70 miles an hour.

Q. Is that within the permitted speed set for you?

A. Yes.

Mr. Murman: Objected to as calling for a conclusion of the witness.

The Court: Well, is that set by law, that speed?

Mr. Phelps: No, that is a limit. There is no speed limit set by law.

Mr. Murman: I move that the answer go out.

Mr. Phelps: The limit I was seeking to elicit from him is a limit set by the company itself. [318]

Mr. Murman: That is self-serving, what their own speed limit is. The question here is whether or not the train was being properly operated.

(Testimony of Jesse A. Stainbrook.)

Mr. Phelps: Very well, Mr. Murman, if I may have a stipulation that there is no contention of violation of any company rule in respect to speed I will withdraw the question.

Mr. Murman: I know of no violation of company rule of speed.

Mr. Phelps: Withdraw the question, then, with that stipulation, so that is not in the case.

Q. Now, then, Mr. Stainbrook, can you tell us whether or not the bell was sounded?

A. The engine bell was ringing.

Q. That is what I am talking about, the engine bell.

A. Yes, sir.

Q. Is that done, that is, the ringing operation, is that done by the fireman or the engineer?

A. The fireman.

Q. And the whistle, who sounds that, you or the fireman?

A. I do. The engineer does.

Q. In the operation of a locomotive, where do you sit, the engineer, where does he sit?

A. On the right side of the cab.

Q. On the right side of the cab in the direction of movement?

A. Yes, sir. [319]

Q. And the fireman, where does he sit?

A. On the left side.

Q. Can you tell us whether or not his view from the right side is obstructed by the boiler of the locomotive?

A. His is not.

Q. That is, some distance down the track.

A. I beg your pardon. I thought you meant across the cab.

(Testimony of Jesse A. Stainbrook.)

Q. Oh, I see what you mean. Yes, I see, in the cab itself. No, I am directing your attention to the view of the engineer as you are operating your locomotive, you sit on the engineer's side, on the engineer's seat box, you look out of the window on that side? A. Yes, sir.

Q. As you looked, was your view obstructed for close objects by anything?

A. It is from the length of the boiler out to the front, it is.

Q. To the extent that your view is obstructed by the boiler, will you tell us whether or not that view is seen by the fireman and, in turn, you rely upon him? A. Yes, sir.

Q. Now, then, getting to the accident itself, did you see the automobile before the impact?

A. No.

Q. What was it, then, that first called your attention that [320] there was about to be an accident?

A. The fireman called to me to "hold them."

Q. What do you mean, "hold them"?

A. That means an emergency.

Q. And in railroad language, does that indicate anything you have to do with respect to the brakes?

A. It means to apply the brakes in emergency then.

Q. When the fireman hollered that, what did you do?

A. I applied the brakes in emergency.

Q. And did you do that immediately?

(Testimony of Jesse A. Stainbrook.)

A. Yes, sir.

Q. All right, and after applying the brakes in emergency, did you see anything in respect to an automobile or any debris?

A. Do you mean before the accident or——

Q. Before the impact. What was the next thing you saw?

A. The next thing I saw after that was a large flash of light and heard an impact.

Q. All right. Now, then, how far, if you know, did the head end of your train travel beyond the Howard Street crossing, approximately?

A. Approximately a half mile.

Q. During that time, may I ask you, were your brakes set in emergency?

A. I beg your pardon?

Q. During that time and as a continuation, were the brakes of [321] your train set in emergency?

A. Yes, sir.

Q. And from your experience as an engineer, from your—you have given us the speed you were going, the equipment you were handling. Can you state whether or not that stop was a good emergency stop under the circumstances?

A. It was.

Q. Now, then, did you go back to the scene of the accident, or were you required to remain with your train?

A. I stayed with the engine at the engine. [322]

Q. At the engine. Directing your attention once again to the time preceding the accident, can you

(Testimony of Jesse A. Stainbrook.)

tell us whether or not the headlight of your locomotive was burning? A. It was burning.

Q. And can you tell us whether or not that train is equipped with one or two headlights?

A. Two headlights.

Q. Can you tell us one or both headlight were working? A. Both were.

Q. Now, how far in your experience will the headlights of that locomotive burn as they were at the time, show up an obstruction, say, of a man on the tracks, how far down the tracks will the beam show up such an object?

A. Well, approximately—I would say from 800 to 1000 feet.

Q. Can you tell us whether or not your headlights on this morning were in good working order or not? A. They were.

Q. They were in good working order?

A. Yes, sir.

Q. Both of them? A. Yes, sir.

Q. Now, did you see as you were approaching Anderson, did you see any train on any siding or passing track?

A. Yes, there was a northbound freight train on the side track.

Q. And which track would that be? [323]

A. That would be the track closest to the highway.

Q. On your side? A. Yes, sir.

Q. Now, in addition to the signals that you have already told us about for the crossings, did you

(Testimony of Jesse A. Stainbrook.)

sound any signal with your—any signal with respect to the train on the siding, any warning signal in respect to it?

A. Yes, I blew the crossing whistle approaching that train to warn them that we were coming.

Q. Now, as you were approaching Anderson and still out in the country, not yet up to the train in on the siding, can you tell us whether or not the second light on the locomotive was oscillating?

A. It was.

Q. And do you know to your knowledge whether that condition of oscillating was changed or not as the train approached the train on the siding?

A. It was changed, yes.

Q. And in what respect?

A. That instead of oscillating it shone directly down the tracks.

Q. And why was that done?

A. For the purpose of the men on the freight train to identify our train more easily.

Q. Light wouldn't shine in their eyes? [324]

A. Yes, sir.

Q. Is that a requirement that men of the other train observe your train and identify it?

A. Yes.

Q. Now, do you know whether that headlight condition of being straight ahead in a fixed position was changed to oscillating position at any time before the accident?

A. It was.

Q. About where?

A. About the caboose of the freight train.

(Testimony of Jesse A. Stainbrook.)

Q. Can you fix for us the best you can approximately where that caboose was?

A. The caboose was just over, as I remember, the crossing north of the station.

Q. And on the map that would be the Ferry Street crossing that I am now talking about?

A. Yes, sir.

Q. And by "over" you mean just south or just north? A. Just south of it.

Q. So that it had the Ferry Street crossing blocked as well as the North Street? A. Yes.

Q. Now, who operates the headlights, turns it on and turns on the oscillating or non-oscillating?

A. The fireman. [325]

Q. What was the condition with respect to daylight or darkness, as you remember?

A. It was just before the break of day, enough that it was still dark.

Q. I beg your pardon, I am sorry, I didn't hear.

The Court: Just before the break of dawn, enough so that it was still dark.

Q. (By Mr. Murman): So that your headlights would pick up objects, is that correct?

A. Yes, sir.

Q. And so far as the state of the weather, atmosphere conditions, can you tell us whether or not it was clear or stormy?

A. It wasn't stormy, it was cloudy.

Q. And was there any mist?

A. Yes, it was misty.

Q. Can you tell us whether or not the mist was

(Testimony of Jesse A. Stainbrook.)

such as to interfere with your vision or whether you could see, nevertheless see objects through the beam of your headlight ahead in the normal course?

A. We could.

Q. It didn't interfere with that? A. No.

Q. Now, then, will you explain to the jury how you, as an engineer, look out and whether there is any—describe the operation of any windbreak or shield so far as your vision [326] is concerned?

A. On the front of the cab at the side immediately in front of where the window was, the side windows, there is what we call a storm window, a window perhaps that wide and the length of the window in height (indicating) and that is also for our protection from wind, rain or sand, whatever it might be, and that is the protection we have to look out from the side of the cab ahead.

Q. So that the air that passes between is deflected out and you can look ahead without the aid of a windshield wiper? A. Yes.

Q. That is true of rain, too? A. Yes.

Q. Now, then, so far as you are concerned, did you have any opportunity to observe whether or not the wig-wag at the Howard Street crossing was operating or not?

Mr. Murman: I object to that as leading and suggestive, if the court please.

Mr. Phelps: How is that leading?

Mr. Murman: This is counsel's own witness.

The Court: I don't think that is leading. Go ahead and answer.

(Testimony of Jesse A. Stainbrook.)

A. I didn't see the wig-wag working.

Q. Tell us whether or not your attention was on other things or whether you were looking——

Mr. Murman: That is immaterial, if the court please.

The Court: Overruled. Answer the question.

A. Yes, sir, I was busy with trying to stop the train.

Mr. Phelps: That is all. You may cross-examine.

Cross-Examination

By Mr. Murman:

Q. You, having had a total of, that is up to the time of the accident, as I understand it, of some 32 years' experience in the Shasta Division; is that correct? A. Yes, sir.

Q. And part of that was as a fireman in the cab of an engine and the bigger part was an engineer in the cab of an engine; is that correct?

A. Yes.

Q. Now, will you tell us on the average about how many trips you would make over the Shasta Division from Gerber to Dunsmuir and back in a week, for example, prior to December, 1948?

A. I couldn't tell you definitely, no. It would depend upon what kind of a run I had, whether or not an extra run or a regular run.

Q. Well, would it be fair to say on the average of at least once a week you made one trip to the north to Dunsmuir and another trip back to Gerber?

(Testimony of Jesse A. Stainbrook.)

A. I don't believe it would be that, I should say that because it might be longer than that that I wouldn't make the trip to Gerber. [328]

Q. From Dunsmuir, you mean? A. Yes.

Q. Stop short of Gerber somewhere?

A. No, would run north of Dunsmuir.

Q. Run on the northern part of the division then? A. Yes.

Q. I see. The Shasta Division then has two divisions, northern and southern division, from Dunsmuir—— A. It is different districts.

Q. Districts. I used the wrong word. The northern district and the southern district is the same division, is that correct?

A. They have it from Dunsmuir to Klamath Falls, Dunsmuir to Ashland, Klamath Falls to Alturas and Dunsmuir to Gerber.

Q. Then we have four districts in a division, is that correct? A. Yes, sir.

Q. I see. All right. Now, prior to the accident had you been working in the district from Dunsmuir to Gerber? A. Yes, sir.

Q. About how long?

A. I think since June regularly.

Q. Regularly since June? A. Yes, sir.

Q. And prior to June of 1948 you hadn't been in the district but on other occasions—— [329]

A. I had been on a regular job to Klamath Falls.

Q. Had that been true for the full scope of your experience? [329-A] A. No, no.

(Testimony of Jesse A. Stainbrook.)

Q. In other words, you shifted around?

A. Yes, sir.

Q. Since June of 1948 until the time of the collision at least you were in the district from Duns-
muir to Gerber?

A. Yes, sir.

Q. At that time, would it be fair to say that you traversed the distance on a round trip from Duns-
muir to Gerber and back on an average at least of
once a week?

A. We went more than that.

Q. More than that?

A. Yes. Every other day.

Q. Every other day you would make a round
trip, every other day?

A. Yes, sir.

Q. As a matter of fact, isn't it true that on the
day prior to the accident you had taken No. 14
north to Dunsmuir, hadn't you?

A. No, I think not.

Q. Well, the defendant has furnished me with
some exhibits here which I have a photostatic copy
of, an original apparently, and it shows that you
were the engineer on No. 14, which apparently went
from Gerber north to Dunsmuir; that is the comple-
ment, is it not, of 13?

A. Yes, sir. [330]

Q. And the same train as No. 14 to the north, or
to the east, as you people use the expression, and
No. 13 is from the north to the south, or to the west?

A. Yes.

Q. I have here a photostatic copy of the dis-
patcher's record of movement of trains, Mr. Stain-
brook, showing apparently that you left Gerber—
this is your name, isn't it, Stainbrook?

(Testimony of Jesse A. Stainbrook.)

A. Yes.

Q. You left Gerber at 9:00, somewhere around 9:00—I can't read the writing, and then took that train north to Dunsmuir, arrived at 12:37 a.m. Does that refresh your recollection that you had taken that particular train on the preceding evening, or is that what the document shows?

Mr. Phelps: Now, I will object as to what the document shows. I have no objection to cross-examination using that to refresh his recollection, but my understanding of that would be, if I read that correctly, it would be 9:35 the same day that he went back that night.

Mr. Murman: That may be; it doesn't show a day; maybe the witness can tell us.

Mr. Phelps: I don't know.

The Witness: Can I explain to him?

The Court: Yes.

The Witness: We would go to Gerber from Dunsmuir on any date and would leave Gerber at 9:50 the same day, that is, [331] providing the train was on time, and arrive at Dunsmuir the next morning, 12:35, we were due there.

Q. (By Mr. Murman): Make the round trip in one day?

A. Yes, sir, but arrived at Dunsmuir the morning of the next day.

Q. Yes, I see. And then you skip a day and make a trip on the next day? A. Yes, sir.

Q. That clears that up. Now, in those runs that you made, Mr. Stainbrook, you went to, necessarily

(Testimony of Jesse A. Stainbrook.)

went through the town of Anderson, didn't you?

A. Yes, sir.

Q. Go through one way going south and then go through going north? A. Yes.

Q. You were familiar with the crossing in Anderson, were you not? A. Yes.

Q. You knew the North Street crossing at the north portion of the town, the Ferry Street, Howard Street, and I believe there was a fourth street, South Street; it doesn't show on the map, isn't that correct? A. Yes.

Q. And did you know about the various signals that appeared at these crossings for traffic that would cross the tracks at [332] those points, did you know about those signals? A. If——

Mr. Phelps: If I may, I should like to make an objection as to any crossings other than the one the accident——

The Court: It will be limited to that.

Q. (By Mr. Murman): Were you familiar with the signal at the Howard Street crossing?

A. Yes.

Q. You had seen it on several occasions, had you? A. Yes.

Q. We have here Defendant's Exhibit O, which shows a picture of it. Is that the crossing signal? So far as you can remember? A. Yes.

Q. Do you know how long that crossing signal had been there? A. No.

Q. Have you any recollection or way of telling us about how long it had been there, according to

(Testimony of Jesse A. Stainbrook.)

your own knowledge? A. No, I haven't.

Q. Would you say it had been there six or seven years or ten years or less time, or how long?

Mr. Phelps: I will object as incompetent, irrelevant and immaterial—it has been some time before.

The Court: I will let the witness answer, if he knows.

A. It has been there a long time, but stating the time, I [333] wouldn't know.

Q. You can't tell us now in years how long?

A. No, sir.

Q. Is that correct? Now, on the day in question, as I understand it, you left Dunsmuir at a very early time in the morning, is that correct?

A. Yes, sir.

Q. I think you were called about 5:00 o'clock, weren't you? A. 5:10 on duty.

Q. You were called on duty and then you took over the train at about 5:25 or somewhere before 6:00, isn't that correct?

A. When we left, yes. [334]

Q. Now, at the times that you took the train over to Dunsmuir did you receive any train orders as to what the conditions were down the track?

Mr. Phelps: I object to that as calling for hearsay.

Mr. Murman: It can be answered yes or no, if the court please.

The Court: Yes, you can answer it yes or no.

A. We received only a clearance card.

(Testimony of Jesse A. Stainbrook.)

Q. (By Mr. Murman): That was at Dunsmuir?

A. Correct.

Q. And that clearance card had to do with the right of way you would expect to traverse south to Gerber?

A. No.

Q. How far south?

A. To Redding.

Q. To Redding. Did you make a stop at Redding?

A. Yes.

Q. And at Redding did you receive any train orders?

A. Yes.

Mr. Phelps: Same objection.

Q. (By Mr. Murman): Did those train orders refer to the freight that was to be on the siding at Anderson?

Mr. Phelps: Same objection, calling for hearsay.

The Court: He said no.

Q. (By Mr. Murman): Did you know when you left Redding that [335] there would be a freight on the siding here at Anderson?

A. No.

Mr. Phelps: Same objection, it is incompetent, irrelevant and immaterial, nothing to do with the accident.

Q. (By Mr. Murman): When did you first become aware of the freight being on the siding at Anderson?

Mr. Phelps: Same objection.

The Court: Proceed.

A. When we were close enough that I could see the lights from his indicators.

Q. And what lights are those that you are referring to?

(Testimony of Jesse A. Stainbrook.)

A. Those are the lights that are in his number boxes showing the number of his train.

Q. That is up on the front part of the engine, up above the boiler, is it?

A. Up on the top, near the top of the boiler in front.

Q. And those number boxes are in what shape, sort of a rectangle shape, are they?

A. Yes, about that long (indicating) but will hold indicator numbers, 4 by something, I believe they are, and the height like that (indicating) that is on either side.

Mr. Murman: May the record show the witness indicated an area of about two feet by ten inches?

Q. Would that be a fair area, Mr. Stainbrook, of those number boxes? [336]

A. I don't know the size of them.

Q. Well, approximately. You have been a railroad engineer now for many, many years, seen those number boxes on the front of locomotives?

A. Oh, yes.

Q. What would be your estimate as to the size, approximately?

A. Approximately eight inches by twenty.

Q. Thank you. And one on each side, is there not?

A. Yes.

Q. Illuminated, are they?

A. Yes, sir.

Q. Now, these particular number boxes you have called them, were they illuminated with numbers on them or were they just open spaces of light?

(Testimony of Jesse A. Stainbrook.)

A. They had numbers.

Q. Numbers on them. And you say those were the first things that you saw, is that correct?

A. Yes.

Q. How about the headlight on the freight, was it out? A. It wasn't burning.

Q. Not burning. About how far were you from the freight when you saw those number boxes?

A. I don't know how far we were from him, we were not very far.

Q. Well, the train light, 15 cars away? [337]

A. Yes, that's right.

Q. That would be a fair distance, would it?

A. Yes.

Q. You're sitting in the cab then on the right side looking out and saw these number boxes on the freight engine that was headed in your direction, is that correct? A. Yes.

Q. About how long is a car on a passenger train?

A. They vary in length, 50-70 feet.

Q. Now, did you have any idea by looking at that number box and the numbers on it as to the length of that freight train? A. No.

Q. The track there is safe, isn't it?

A. Yes, sir.

Q. And when you saw the number boxes on the freight, was your headlight and operating Mars light, was it illuminating the right of way down past the freight engine? A. Yes.

Q. Isn't it a fact, Mr. Stainbrook, that those lights that shone down there a thousand feet, as

(Testimony of Jesse A. Stainbrook.)

I understand it, 800 to a thousand feet, it illuminated the train before you saw the number boxes?

A. I didn't see it with the light until I saw the number plates.

Q. Well, you yourself didn't see the train until you saw the number plates, isn't that correct? [338]

A. Yes.

Q. But you did tell us, did you not, that with your headlights on full and your Mars light oscillating that it would show down the track some 1000 to 800 feet, is that correct? A. Yes.

Q. And you were less than that distance from the head end of the freight, were you not, when you saw the number boxes? Or were you?

A. Well, I don't know the exact distance of that. If we were, if we were a shorter distance than that——

Q. All right. Now, as you came up to the freight your headlights would illuminate the cars on down the right of way, that would be on the lefthand side of the freight train, would they not? A. Yes.

Q. And couldn't you see the length of cars extending on down the track from a long distance from the engine from the freight engine, that was on your side, wasn't it? A. Yes.

Q. Couldn't you see those cars?

A. Oh, yes, I could see those cars there.

Q. And couldn't you see that they extended into Anderson and across these crossings down to some point south of the Ferry Street crossing?

(Testimony of Jesse A. Stainbrook.)

A. After we were a ways past I did and I could tell, yes. [339]

Q. By the way, when you stopped your Mars light from oscillating, did you dim the lights too?

A. No.

Q. You kept them on full? A. Yes.

Q. You were on full beam then from the time that you first, or beyond the time and continuing past the time that you saw the freight engine and freight train down the track? A. Yes.

Q. But the difference was that you stopped the oscillation of the Mars light? A. Yes.

Q. Now, about how far were you from the North Street crossing, to begin with, when you saw that the freight train was blocking the North Street crossing?

A. Well, I wouldn't know exactly, but we were some little ways north of that when I could tell that he was blocking the crossing.

Q. Were you as far north as the beam of your headlight shone out in front of you; in other words, a thousand feet? A. I don't know that.

Q. No, but I am asking if that is approximately about the distance?

A. When I noticed that the caboose was beyond the crossing I could plainly see it there. [340]

Q. Well,—

A. The distance, I don't know.

Q. That was past the Ferry Street crossing, wasn't it? A. Yes, sir.

Q. So that the caboose, which was at the tail end

(Testimony of Jesse A. Stainbrook.)

of the freight train, that blocked beyond the North Street and Ferry Street crossings? A. Yes.

Q. Now, when were you aware of the freight train blocking the North Street crossing, where were you on the track coming into Anderson?

A. I don't know that, I don't know just where we were, but we were north of that, up there somewhere.

Q. When you first saw that the freight train was across the North Street crossing, where were your headlights showing up objects, beyond North Street or just picking up the North Street crossing?

A. No, we could see beyond there.

Q. You could see beyond there. When you saw that the freight train was across the North Street crossing, is that correct? A. Yes.

Q. How far beyond could you see with your headlight, could you see as far as the caboose?

A. I don't know that, I don't know just where we were in regard to our place on the track at the time I could see the [341] caboose.

Q. No, that wasn't my question. My question was at the time that you saw that the North Street crossing was blocked by the freight, I understood you to say the beam of your headlight was beyond that point. Now, my question was, how far beyond the point was the beam of your headlight; in other words, did the headlight illuminate the caboose at the time you first noticed the freight across the North Street crossing?

(Testimony of Jesse A. Stainbrook.)

A. Well, I don't remember that; I don't know that, where we were then.

Q. You mean at the time that you were aware of the freight train being on this siding and being across the North Street crossing, you don't recall where you were in the southbound passenger that was going toward the Howard Street crossing, is that correct? You don't know where you were at all.

A. I don't know where we were in regard to seeing where the caboose was at that time.

Q. You don't understand my question. My question is, when you saw the freight at the North Street crossing could you, at the same time, see the freight, the caboose beyond the Ferry Street crossing? That is the question.

A. Well, that I can't remember about that because——

Q. You, at any time, remember seeing beyond the North Street crossing and Ferry Street being blocked by the same train? A. Yes. [342]

Q. All right. Now, where were you when you saw that; were you beyond North Street, that would be north of North Street?

A. I don't know that.

Q. You don't know that? A. No, sir.

Q. What is your best recollection?

A. I have no recollection of that as to our position of those crossings.

Q. Let me ask you this question: When you were aware of these two crossings being blocked, were you still north of the North Street crossing?

(Testimony of Jesse A. Stainbrook.)

A. I don't know that.

Q. You don't know that? A. No, sir.

Q. And you have no recollection on it, is that correct?

A. Not in regards to that North Street crossing and the caboose.

Q. Did you have something in the cab that was attracting your attention? A. No.

Q. You were sitting there on your engineer's box on the right side where you can see down the right side of the track; were you sitting there looking out of the window? A. Yes.

Q. You said earlier it was misty. How could you tell it was [343] misty?

A. Well, just by the weather condition, of the mist that was blowing in the air.

Q. You could see the mist in the air, is that correct?

A. No, not exactly that, but you could feel it as it was out past our storm window.

Q. Didn't see it in the air, didn't see a fog-like atmospheric condition, a misty condition in the air, the atmosphere wasn't clear?

A. But it wasn't foggy.

Q. What was impairing its clearness? If it wasn't mist, was it something else?

A. Well, it was cloudy and misty.

Q. Low clouds? A. No.

Q. Overcast, is that correct?

A. Overcast, yes.

(Testimony of Jesse A. Stainbrook.)

Q. Was the mist sufficient to accumulate moisture on your storm window or any of the windows of your cab?

A. Not enough that it bothered us at all, or impaired our vision.

Q. And still you say sitting there on the right side of the cab you can't tell me if you were north of the North Street crossing when you noticed both of these crossings blocked, is that correct? [344]

A. No.

Q. Now, did you slacken your speed at any time?

A. The speed may have slackened a little before we were to that next crossing.

Q. Now, which is the next crossing, the Howard Street crossing? A. Yes, sir.

Q. And would that be due to the brake applications? A. No.

Q. What would it be due to?

A. It would be due to the fact that there is a slight upgrade there.

Q. A slight upgrade at Anderson?

A. Yes.

Q. It is generally a downgrade from Dunsmuir to Anderson, is it not?

A. From Anderson——

Q. Let us take it from Redding to Anderson; generally it is downgrade, isn't it?

A. Not particularly, no.

Q. You mean you go up and down, rise and then fall?

(Testimony of Jesse A. Stainbrook.)

A. I don't mean that exactly. Coming into Anderson from the north it is slightly downhill.

Q. Yes.

A. And going through Anderson toward the south and there it [345] is slightly uphill.

Q. Well, had you taken the power off the drivers then as you approached Anderson; is that what you were doing?

A. Not exactly that, but working a light throttle.

Q. Working a light throttle? A. Yes.

Q. Some acceleration but not a full throttle?

A. That's right.

Q. And was that light throttle being used because of the slight upgrade in Anderson?

A. No, that—it was used to maintain the speed we were making.

Q. All right, you didn't slacken your speed, is that correct; you would maintaining it?

A. Yes.

Q. That speed was 70 miles an hour, as I understand it; is that correct? A. Yes, sir.

Q. Now, you said it was still dark, isn't that correct? A. Yes.

Q. And you were still using full headlights, is that right? A. Yes.

Q. Prior to the collision at the Howard Street crossing, did you say you didn't see anything of the right of way ahead of you prior to the collision?

A. I didn't, no.

Q. You didn't see anything? A. No.

Q. So that when the fireman called out to you,

(Testimony of Jesse A. Stainbrook.)

“Hold them,” I think you used the expression, you didn’t have any idea at that time that there was anything ahead of the engine; is that correct, that is, that you could see? A. That’s right.

Q. Now, when you were north of the North Street crossing here, Mr. Stainbrook, did you blow your whistle? A. Yes.

Q. And how far north of the crossing were you when you blew your whistle?

A. Well, I was blowing the whistle, you might say, not just continually, but intermittently from a quarter of a mile north of there.

Q. What do you mean by “intermittently”?

A. Well, I would blow for the crossing whistle and then immediately repeat it.

Q. And what were the intervals of time between the blowing of the whistle?

A. Just a few seconds.

Q. A few seconds. And when you say a few seconds, can you give us anything more definite, or do you know? A. No. [347]

Q. Would it be more than two seconds or just two seconds or less?

A. Perhaps it would be a little more than a second, or two seconds, like that, and perhaps just a little less than that.

Q. So somewhere around two-second intervals you were blowing the whistle, is that correct?

A. That or less.

Q. Now, as I understand it, you were on the right side of the cab, is that correct?

(Testimony of Jesse A. Stainbrook.)

A. Yes.

Q. And as you approached the Howard Street crossing you said that you didn't see the wig-wag signal; is that correct? A. Yes.

Q. What were you looking at as you came down the track from North Street to Howard, do you remember? A. Looking down the track.

Q. Looking down the track, that is, your attention wasn't diverted to something in the cab, still maintained your look-out position? A. Yes.

Q. These two headlights that you had on the front of the train, did they throw a beam to either side, to the left and to the right?

A. The oscillating, the Mars headlight—when it is oscillating. [348]

Q. Yes. Well, as the train is further removed from the object ahead, the beam spreads out?

A. Yes.

Q. Even the stationary light, isn't that correct?

A. Yes.

Q. Now, as you came down from North Street to Howard Street, wouldn't the beam of the headlight spread out to illuminate the whole crossing at Howard Street, so far as you could tell?

A. It illuminated the crossing as we were coming straight down the track.

Q. You mean its illumination was concentrated on the main line after crossing the Howard Street?

A. No, not exactly that, it illuminated as far as whatever the beams throw there.

Q. Well, could you see either to the right or to

(Testimony of Jesse A. Stainbrook.)

the left of the Howard Street crossing by the headlight beam as you approached the crossing?

A. I could see to the right of it, yes.

Q. What obscured your seeing to the left? Now, I am speaking now where you are back at the North Street——

A. I don't understand just what he means.

Q. Well, I will reframe the question.

The Court: Let's take a recess. Ladies and gentlemen, we will take a recess for ten minutes and during the recess bear in mind my former admonition to you.

(Recess.) [349]

Q. (By Mr. Murman): Mr. Stainbrook, when the fireman called out to you "Hold them," do you have any idea about where the engine was at that time as it was approaching the Howard Street crossing? A. Well, approximately 200 feet.

Q. 200 feet? Now, that is one thing you can recall, is that right? A. About that.

Q. Yes. How do you happen to recall it was about 200 feet? Were you some place on the track that fixes that in your mind?

A. Yes, we weren't to the crossing yet.

Q. Had you crossed the Ferry Street crossing?

A. Yes.

Q. Were you opposite or beyond or in front of the station here?

A. Well, I don't know exactly that. The station

(Testimony of Jesse A. Stainbrook.)

is on the opposite side. I don't know exactly where we were in regard to the station.

Q. Well, you of course knew the station was between Howard Street and Ferry Street. You had been by that many times, hadn't you?

A. Yes.

Q. Well, can you state why you have some idea you were about 200 feet? What fixes that distance in your mind? What was it makes you—give us your recollection.

A. On account of him calling to me as he did, I knew it. [350]

Q. But he was in the cab with you.

The Court: Let him finish his answer, Mr. Murman.

Mr. Murman: Pardon me.

The Court: He started to say he knew something.

A. I knew there was some reason for him telling me what he did, and the way he told me, and I knew that we were not to the crossing, and it is just in my mind approximately that distance.

Q. It is based on the speed you were going, 70 miles an hour? That is about one hundred and two or three feet a second, isn't it, or do you know?

A. About 105 feet a second, I believe.

Q. 105 feet a second? Was it about two seconds from the time the fireman called out to you to "Hold them" that the collision occurred at the crossing?

(Testimony of Jesse A. Stainbrook.)

A. Well, that thing, I don't know, but the time, it was very shortly after he hollered to me.

Q. You can't tell us now just how you have that definite recollection of 200 feet except that the fireman called out to you, and that is your best recollection, is that right? A. Yes, sir.

Q. Now, are you sure, Mr. Stainbrook, that you were blowing the whistle for two seconds intervals, all the way down the track to the time of the collision? Are you sure of that?

A. I don't know that I said two seconds. It may be less than two seconds, but immediately after passing over that crossing, [351] with conclusion of that whistle, then right away I would start the next whistle.

Q. (Do you remember giving your deposition to the coroner after this accident occurred? Do you remember the incident on December 27, 1948, at 5:00 o'clock p.m., you gave a deposition to Claude E. Whiteman, coroner of Shasta County, California, where one E. N. Harold, shorthand reporter, was present, and you were sworn by the coroner; do you remember that? A. Yes.

Q. I have here what purports to be——

Mr. Phelps: May I see it?

Mr. Murman: Don't you have a copy? (Handing document to counsel.)

Mr. Murman: By the way, while counsel is reading that, do you recall whether you blew the whistle, if you did blow it as you came to the

(Testimony of Jesse A. Stainbrook.)

Howard Street crossing, before or after the fireman called out, "Hold them," do you?

A. I was blowing it when he called to me, as nearly as I remember that.

Q. I will ask you to look at this and state whether or not you recall giving the answers that appear on page 2 of the deposition to the questions commencing at line 24 and concluding at line 25. Now, you read it over to yourself. Did you give those answers to those questions? [352]

Mr. Phelps: I will object to that, if your Honor please. This man is not a party to this action. It isn't binding on the defendant, Southern Pacific Company, and it is hearsay and is incompetent, irrelevant and immaterial what was said on other occasions.

The Court: It will be overruled.

Mr. Phelps: If there is going to be proof of this by other means, then I suggest that statement be made by counsel.

The Court: He has asked if he made them and he can testify whether he did or not.

Mr. Murman: That is the question.

Q. Did you give those answers to those questions, Mr. Stainbrook?

A. I don't know; I don't remember if that is the exact statement I made to him.

Q. Well, there are several answers here. Can you point out any other answer that you don't recall having given, or does your answer that you have just given me go to all the answers that you

(Testimony of Jesse A. Stainbrook.)

gave within the page area I directed your attention to? A. To read it all, you mean?

Q. You said you don't recall if your answers to them were the answers you gave to the questions set forth here in the deposition, isn't that correct? Is that what you just told me? A. Yes. [353]

Q. All right now, which answer don't you recall giving, or is it your answer that you don't recall giving any of them?

Mr. Phelps: To which, if your Honor please, I object as not a proper way of impeachment. This is not a party defendant.

The Court: Overruled.

Mr. Murman: Let him answer the question, please.

Q. Do you understand the question?

A. Well, hardly, no.

Q. My question is this: You said you don't recall giving those answers, is that right? Is that what you said? I thought that is what you said.

A. I said, what I meant to say, is that I don't recall, I don't remember if that is the way I answered, or the answer I gave him. I don't remember whether or not that is how I answered this question.

Q. Let me ask you this: Do you remember the questions as they are set forth here having been asked of you?

A. I remember him asking me if I knew where we were when the fireman hollered to me to "Hold them."

(Testimony of Jesse A. Stainbrook.)

Q. Yes. I think that is on the first page. That is on the first page here. Do you remember the answer to the question that appears on the bottom of the first page?

Mr. Phelps: My objection goes to this entire line of questioning, your Honor. [354]

The Court: Yes.

Mr. Phelps: I don't think it is a proper way to get at impeachment. There is a proper way.

Mr. Murman: I am trying to find out if he remembers, Mr. Phelps. I haven't proceeded to the impeachment part yet.

A. The last question I remember of him asking me that, yes.

Q. (By Mr. Murman): This, "Did you see the car after it was hit," and your answer, "No."

A. Yes.

Q. But you don't remember the preceding question and your answer you gave there of some one, two, three, four, five, six, seven lines?

A. I didn't read that.

Q. Oh, I thought that is what you were looking at. Will you look at that? That is what I thought you just referred to when you said you remember him asking you about the fireman calling out to you. Do you remember giving that answer?

A. Yes.

Q. Then you remember giving the answer to the next question, don't you? A. Yes.

Q. All right.

Mr. Phelps: I submit, if your Honor please,

(Testimony of Jesse A. Stainbrook.)

this is not proper cross-examination, asking him to remember making certain questions and answers. It isn't impeachment and would [355] be hearsay, have to be proved by somebody else. This isn't a proper way to go about it, and it is incompetent, irrelevant and immaterial and hearsay, and not binding on the defendant, Southern Pacific Company, as not a party. Mr. Stainbrook is not a party.

The Court: I think it is proper to ask from the witness if he remembers making certain answers to certain inquiries made of him at a different time if it pertains to what he has already testified to. You can ask him whether or not he remembers it, first. If he does not remember it, you can't use it to impeach him. If he does, you can use it to impeach him, if it refers to something that is an impeachment.

Mr. Phelps: Yes, your Honor.

Q. (By Mr. Murman): Do you remember the answer that you gave to the next question as it appears there? In other words, read down the page there and tell me whether you remember making those answers to those questions.

Mr. Phelps: Mr. Murman, will you show me what you are pointing to when you are through?

Mr. Murman: Yes.

Mr. Phelps: Just so I will know.

Mr. Murman: Yes, surely. I thought you had a copy of it.

Q. (By Mr. Murman): Have you finished?

A. Yes, sir.

(Testimony of Jesse A. Stainbrook.)

Q. Do you remember giving the answers to the questions there? [356]

A. I remember giving the answers to some of that.

Q. But you don't remember as to others, is that right?

A. I don't remember all of them as answering those questions. I don't remember that, no.

Q. That pertains particularly to the part that I called your attention to first, between lines 14 and 25? A. Well——

Q. That is the part that I called your attention to first.

A. I don't remember of answering it that way, no.

Q. All right. Now, as your train approached this crossing, did you see any persons on the crossing, any individuals at all, any people?

A. No.

Q. And as you looked down beyond the crossing, down the right of way, was it clear ahead of the train down the right of way as far as you could tell? A. You mean——

Q. Beyond the crossing.

A. You mean nothing on the track?

Q. Yes. A. Nothing I could see, no.

Q. Could you see the track as you came down the right of way prior to crossing Howard Street?

A. Yes.

Q. About how far in front of the engine, Mr. Stainbrook, would [357] you say the boiler cut off

(Testimony of Jesse A. Stainbrook.)

your view of the right of way itself, of the main track? A. I don't know. I don't know.

Q. Well, about how far? You have been a locomotive engineer now for 24 years, or up to the time of this accident. What is your best estimate as to how far in front of the locomotive would your vision be obscured by the boiler?

A. Well, I wouldn't know how far because I have never had an opportunity of measuring that distance and I wouldn't know. Now, you take a distance from the front end of your engine to where your view is cut off, the distance from there and the distance looking from that, from the side back at the back end of the boiler, the distance perhaps would be considerably different in being correct, in knowing, and I don't believe that I could fairly give an estimate of that distance.

Q. Can you estimate it in boiler lengths if you can't estimate it in feet? A. No.

Q. Well, let me ask you this question: When you were at Ferry Street, which is approximately, according to this map, a distance of 20 feet to each inch, approximately 500 feet, could you see from where you sat in the cab, could you see across the main line tracks over to the east siding when you were back here 500 feet at Ferry Street?

A. I didn't. [358]

Q. You mean you didn't look, is that what you mean? A. May I explain?

Q. Could you answer the question, then you can

(Testimony of Jesse A. Stainbrook.)

explain it. Just tell me, you mean you didn't look, or were you looking?

A. I was looking down the track.

Q. Looking down the track? Now, you want to make an explanation?

The Court: Go ahead.

A. When we were coming to Anderson, those crossings as close as they are together, we approach that crossing and whistle for that and we are there immediately, and then there is another crossing beyond that that we are looking for anything that may be on that or on the track intervening, and I wasn't looking out to that side to see how far I could see or if I could see across those tracks.

Q. You mean you were traveling so fast that as you came down here you couldn't see what was on this crossing sufficiently clear to permit you a complete observation ahead down the line?

A. No, I didn't say it that way. I said my mind was centered on down the track.

Q. Just down the track? Could you have seen the east siding from the North Street crossing? That is almost 1000 feet. That is about 900 feet, according to this scale. Could you see when you were up at North Street, could you see the east siding? [359]

A. I don't know that you can see it there. You can see it a distance ahead of the engine.

Q. On that particular morning you have no recollection, then, when you were at North Street,

(Testimony of Jesse A. Stainbrook.)

of seeing the east siding here at Howard Street, is that correct? A. That is correct.

Q. Did you at any time see the east portion of the Howard Street crossing as you came down the right of way there? Do you remember seeing it at any time? A. I don't remember of that.

Q. Was the station in your way at any time in looking down at the east side of the Howard Street crossing?

A. It didn't obstruct my view from the right side down the track.

Q. Did you see the station at any time that you were approaching Howard Street crossing?

A. Yes, I saw the station.

Q. Where were you when you saw the station?

A. North of it somewhere.

Q. Do you know whether you were north of Ferry Street or north of North Street or beyond that, or do you know?

A. We weren't too far north of it when I could see it.

Q. North of the station? A. Yes.

Q. When you say, "too far," where do you mean, were you north [360] of Ferry Street?

A. I don't know whether we were or not.

Q. Do you know if you were north of North Street? A. North.

Q. Isn't it a fact you were going so fast you just couldn't keep track of your position?

A. No, no, it wasn't.

(Testimony of Jesse A. Stainbrook.)

Q. Is that the normal speed through Anderson, 70 miles an hour?

A. For a passenger train, yes.

Q. Was it the mist that stopped you from seeing any of those crossings?

A. No, it was what I told you, that my mind is fixed on the crossings ahead and what might be there and those crossings as we approached them.

Q. You mean by that when you are at Ferry Street your mind is fixed on Howard Street?

A. Not necessarily. The intervening track, also.

Q. Intervening track? You mean the main line track? Is that the intervening track?

A. It is the space between where I can see and where we are.

Q. You don't recall seeing any flagman at this crossing, is that correct? A. No.

Q. Did you see any of the train crew of the caboose out by the caboose as you went by? [361]

A. No. I saw—I saw a light go from the left side of the track to the right side before we got there to the caboose.

Q. You saw a light? You mean by that a lantern or something of that kind?

A. To me it would be a trainman's lantern, yes.

Q. You didn't see who was carrying it?

A. No.

Q. Where were you when you saw a trainman's lantern going across from the east to the west to where the caboose was, where were you on the track? A. We were considerably north of it.

(Testimony of Jesse A. Stainbrook.)

Q. How far? A. I don't know how far.

Q. Well, were you north of the North Street crossing? A. I don't know of that.

Q. You can't tell us now when you saw this lantern light traveling the area east to west down here by the caboose, can't tell us whether you were by the Ferry Street—between Ferry Street and North Street or North Street and Howard Street?

A. No.

Q. What was the matter with your headlights? Didn't they light up the individual who was carrying it down here?

A. You could distinguish that it was a person walking, but to tell who it was, I couldn't tell that.

Q. Oh, you could see it was a person walking?

A. There was a person walking across.

Q. You did see that in addition to the lantern, is that correct? A. Yes.

Q. All right, does that help you fix the point that you were on on the tracks when you saw a person walking with a lantern? A. No, it doesn't.

Q. It does not? A. It does not.

Q. I show you a panorama of that area that we are concerned with, which is Defendant's Exhibit L, I believe. At any time as you came down that track at 70 miles an hour do you remember seeing any recent obstruction on the railroad track? Do you remember seeing any telegraph poles, for example?

A. No, I didn't see them.

Q. Do you remember seeing a semaphore?

A. I saw the light in it.

(Testimony of Jesse A. Stainbrook.)

Q. How far back were you when you saw the light in the semaphore?

A. I don't know. You can see the light for a long ways.

Q. When you say a long ways now, were you north of North Street again or not?

A. You can see that light north of North Street, yes.

Q. Did you see it when you were north of North Street?

A. I don't know. We see the light up there a long ways up the track.

Q. You don't know whether you were north of North Street at the [363] time or not?

A. No.

Q. Do you remember seeing anything else than the man carrying the lantern and those other things that you have mentioned as you came down this main line at 70 miles an hour toward that crossing? Is there anything else you saw there that you can recall now?

A. What do you mean by that? Of obstructions, or what do you mean?

Q. Well, you told us that, you do recall seeing this east siding, you do recall the end of the caboose between Ferry Street and Howard Street, you do recall seeing somebody walk across it with a lantern, you do recall the station over here, you do recall the signal here, called a wig-wag signal. Now, do you recall seeing this crossing button and stop sign down here on the east side of Howard Street?

(Testimony of Jesse A. Stainbrook.)

A. No.

Q. Do you recall seeing this switch standard here south of Howard Street? A. Yes.

Q. You do recall seeing that? A. Yes.

Q. And what causes you to recall seeing that, what is in your mind to make that stand out?

A. Because if that switch were wrong, that target was wrong, it [364] would show red to us.

Q. Did you see any red? A. No.

Q. What did you see there?

A. Saw that it was not lined red.

Q. Could you see any color at all, you are giving that—you didn't see red, did you see anything there, if you didn't see red? A. I didn't see a color.

Q. You saw an object there, is that correct?

A. Yes.

Q. And it was not red, is that right?

A. That's right.

Q. Did you see this crossing buck, as it is called, at the Ferry Street crossing, which was on the right side of the train as it went south; do you remember seeing that? A. No, I didn't see that.

Mr. Murman: I don't think I have any further questions.

Redirect Examination

By Mr. Phelps:

Q. Mr. Stainbrook, you mentioned that the—you were still using full headlight. May I ask you in the daytime on a passenger train now, and at that time, did you still leave your headlight on full?

(Testimony of Jesse A. Stainbrook.)

Mr. Murman: I object to that as immaterial, if the Court please; the witness testified it was dark.

The Court: He has already stated that they were on. I will allow it.

Mr. Phelps: Yes.

The Court: All right.

Mr. Phelps: My position was to show they remained on.

The Witness: Yes, they were on.

Q. (By Mr. Phelps): That has to do with the regular headlight, is that right? Now, you were asked something about this switch stand. One of your duties is to check the switch to see if they are lined properly? A. Yes.

Q. If it is not lined properly, what happens? It throws the train in the ditch, doesn't it?

A. Yes.

Q. And you can remember that. Something mentioned about working a light throttle to maintain speed. Did you change the amount of steam as you were going uphill into Anderson, or did you leave the throttle at the same?

A. The throttle was left as it was, coming into Anderson.

Q. As the train then went uphill with the throttle in the position you left it, would it lose speed, or not? A. It would lose speed, yes.

Mr. Phelps: I think that is all.

(Testimony of Jesse A. Stainbrook.)

Recross-Examination

By Mr. Murman:

Q. You said that it is your duty to observe the switch [366] standards. Wasn't it also your duty to examine the wig-wag and other crossing devices?

A. Yes.

Mr. Phelps: That is objected to, if your Honor please, as—calling for conclusion, and ask the objection precede the answer.

Mr. Murman: I submit it is proper, if the Court please.

The Court: I think I will allow it to stand.

Mr. Murman: No further questions.

Redirect Examination

By Mr. Phelps:

Q. Mr. Stainbrook, as you were approaching the crossing your duties require you to watch out for vehicle traffic on and approaching the crossing, is that correct? A. Yes.

Q. On your side. And you're checking the crossings beyond, too, aren't you; is that what you have told us? A. Yes.

Q. Now, then, in the operation of the business of bringing the train to a stop, has your attention been diverted from the business at hand? In other words, does that require you to use levers and other devices to bring the train to a stop?

A. Yes.

(Testimony of Jesse A. Stainbrook.)

Q. Would that divert your attention from observing the things around the crossing?

A. It would. [367]

Mr. Phelps: No further questions.

Mr. Murman: No further questions.

Mr. Phelps: May this witness be excused, your Honor?

The Court: As far as I am concerned.

Mr. Murman: Yes, I have no objection.

Mr. Phelps: Call Mr. Kafer, please.

No. 12593

United States
Court of Appeals
for the Ninth Circuit.

NELDA SHANAHAN,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY,

Appellee.

Transcript of Record
In Two Volumes
Volume II
(Pages 347 to 576)

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

OCT 31 1950

PAUL P. O'BRIEN,

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Appeal from the United States District Court,
Northern District of California,
Southern Division.

PHILLIP S. KAHER

called as a witness on behalf of the defendant,
sworn.

The Clerk: Will you state your full name to
the Court and jury, please?

A. Phillip S. Kafer.

Direct Examination

By Mr. Phelps:

Q. Mr. Kafer, where do you live?

A. Dunsmuir, California.

Q. And how long have you lived there?

A. Practically all my life.

Q. And by whom are you employed?

A. Southern Pacific Company.

Q. And in what capacity?

A. Locomotive fireman.

Q. How long have you been employed as a locomotive fireman?

A. May 16, 1941.

Q. Are you what is called a promoted man?

A. Yes, sir. [368]

Q. By that what do you mean?

A. I was promoted to an engineer.

Q. So that you are qualified to act as a locomotive engineer when the work permits?

A. When the work permits, yes, sir.

Q. By that do you mean by the—by seniority, is that correct?

A. Yes, sir.

Q. Now, in December 27, 1948, I take it your seniority did not permit you to work as a locomotive engineer?

(Testimony of Phillip S. Kafer.)

A. At that time I wasn't a promoted man.

Q. You weren't a promoted man and you have been promoted since, is that correct?

A. Yes.

Q. All right. Mr. Kafer, have you ever had any other experience in a locomotive engine other than with the Southern Pacific Company?

A. No, sir.

Q. Now, what division do you work out of?

A. Shasta Division.

Q. And has all your experience been on that division? A. Yes, it has.

Q. And except for recent trips as locomotive engineer all the trips have been as a fireman, is that right? A. Yes, sir.

Q. All the other trips? [369] A. Yes.

Q. Now, then, Mr. Kafer, directing your attention to December 27, 1948, can you tell us whether or not you were acting as a fireman on a passenger locomotive which was involved in an accident in Anderson? A. Yes, sir, I was.

Q. And what was the number of that train?

A. No. 13.

Q. And where did you go on duty?

A. At Dunsmuir.

Q. Where did your run terminate?

A. Gerber.

Q. And who was your engineer?

A. Mr. Stainbrook.

Q. The man that just left the court room?

A. Yes.

(Testimony of Phillip S. Kafer.)

Q. Now, then, do you remember what time you went on duty at Dunsmuir?

A. We were called on duty at 5:10 a.m.

Q. Do you remember the number of cars you had?

A. No, sir, I do not.

Q. You don't have any independent memory of that?

A. No, sir.

Q. All right. Mr. Kafer, when you went on duty at Dunsmuir and from then until the time of the accident, did you have [370] occasion to observe the running of the locomotive and train and determine whether or not the brakes were in good operating condition?

A. Yes, sir; I did.

Q. Can you tell us whether or not they were in proper condition?

A. To my knowledge they were.

Q. You saw nothing unusual about the handling of them?

A. No, sir, I did not.

Q. Worked all right so far as your observation?

A. Yes, sir.

Q. Mr. Kafer, in the running of a locomotive, the duties of a fireman, do they consist of having anything to do with the actual control of the movement of the engine? In other words, what I have in mind, is there any throttle or brake on your side of the locomotive?

A. No, there is not.

Q. So if any conditions are observed by the fireman which require stopping or slowing down, how is that information communicated to the engineer?

A. We call it by voice.

(Testimony of Phillip S. Kafer.)

Q. And then the engineer takes a signal from you in that respect?

A. That is right, yes, sir.

Q. All right, now, in the operation of a locomotive and this particular locomotive this morning, your duties did entail, did [371] include looking out on your side of the locomotive, is that right?

A. Yes, sir, it did.

Q. That would be which side?

A. The left side of the locomotive.

Q. And on this day and as you were approaching the town of Anderson, were you in that position? A. Yes, sir.

Q. And in other words, you weren't running the locomotive? A. No, I wasn't.

Q. Sometimes——

A. Wasn't allowed to run it.

Q. Now, on that day and directing your attention to the accident, approximately what speed was your locomotive running as it was running through Anderson and just before you noticed—withdraw that. I am getting ahead of the story.

Approximately what speed was your locomotive running through Anderson before its brakes were applied?

A. Approximately between 65 and 70 miles an hour.

Q. Do you have a speedometer on your side?

A. No, we do not.

(Testimony of Phillip S. Kafer.)

Q. So that is your best estimate of the speed?

A. Yes, that is my best estimate.

Q. Now, then, in a locomotive of that type, referring to the one that you had on this morning of the accident, who operates [372] the bell?

A. The bell is operated from the fireman's side, or the left side of the cab.

Q. How is that rung, by hand or automatically?

A. It is rung automatically.

Q. Now, on this occasion can you tell us whether or not the bell was ringing as you were going through the town of Anderson and approaching the Howard Street crossing?

A. The bell was ringing.

Q. And where were you, if you remember, when you turned the bell on, if you did?

A. The bell was turned on approximately a quarter of a mile north of the Signal Oil Distributing plant crossing north of Anderson.

Q. Is that Signal Oil?

A. There is a Signal Oil distributing plant there.

Q. And does that appear on this map? Will you step down so that we can look at this map so I will explain it to you, and see if you understand it. In this map we have Howard Street and it isn't marked as such, but this is the Howard Street crossing I am now indicating.

A. Yes.

Q. You recognize that as the first crossing south of the depot or station?

A. Yes, I do. [373]

Q. Now, we have another crossing called the Ferry Street crossing which is north of the station,

(Testimony of Phillip S. Kafer.)

and then there is still another crossing up by the store, the diagram, the parallelogram, indicates a store, North Street; do you recognize that crossing?

A. I recognize the crossing.

Q. Now, is there another crossing in the little hamlet of Anderson and if so, where is that?

A. It would be a little south of this crossing, of the Howard Street crossing.

Q. That would be the direction towards Red Bluff. Does that crossing that you have—do you understand the map now?

A. Yes.

Q. You can resume the stand. This crossing you mentioned that this distributing plant is near, does that appear on this map or not?

A. No, sir, it does not appear.

Q. Approximately where is it with relation to the North Street crossing?

A. Approximately a mile north of that North Street crossing.

Q. And are there any other crossings in there?

A. No, sir.

Q. All right. As you approached Anderson, turned the bell on at the point you have already testified to, did you leave it on and when did you turn it off? [374]

A. I left—turned the bell on in that place, as I have said, I turned it off after we had stopped, after the accident.

Q. After you had come to a stop, after the—south of the crossing after the accident?

A. Yes.

(Testimony of Phillip S. Kafer.)

Q. And during that intervening time, can you tell us whether or not your personal observation, whether or not it was ringing and working properly? A. It was working properly.

Q. I see.

Mr. Phelps: We have reached 4:00 o'clock. Does your Honor want to adjourn?

The Court: All right. We will adjourn now, ladies and gentlemen, until 10:00 o'clock, and in the interim please bear in mind the admonition I have heretofore given you.

(Whereupon, an adjournment was taken till 10:00 o'clock a.m., Wednesday, December 28, 1949.) [375]

December 28, 1949 at 10:00 o'Clock

The Clerk: Shanahan vs. the Southern Pacific Company, on trial.

Mr. Phelps: Mr. Kafer was on the stand. Will you get Mr. Kafer?

PHILLIP S. KAFER

resumed the stand, previously sworn.

Direct Examination

(Continued)

By Mr. Phelps:

Q. Now, Mr. Kafer, before we adjourned yesterday evening, I believe you had told us about the operation of the bell? A. Yes.

Q. Which is something the fireman does, and that is your job? A. Yes.

(Testimony of Phillip S. Kafer.)

Q. Now, then, with reference to the headlight, will you tell us as you were coming out of Redding, Mr. Kafer, were the headlights burning?

A. Yes, they were.

Q. And two headlights or just one?

A. There are two headlights on that engine.

Q. And one—will you tell us what the various—the two types are?

A. The one headlight is called a Mars headlight, which in [376] operation is oscillating or wagging across in front of the engine. The other one is the regular headlight that is held stationary.

Q. All right. Now, proceeding south of Redding and before you came to the train on the siding at Anderson, can you tell us whether or not the headlights were burning?

A. Both headlights were burning.

Q. All right. And with reference to the Mars headlight, was it oscillating or stationary?

A. For the train on the siding it was stationary.

Q. Before you came to the train on the siding was it oscillating or stationary?

A. I put it on stationary position before we came to the train on the siding.

Q. Now, you say you did? A. Yes.

Q. You operated the control that did it?

A. Yes, I did.

Q. Now, then, when that headlight is on stationary, then you have two lights headed directly down the track? A. Yes, you have.

(Testimony of Phillip S. Kafer.)

Q. And can you tell us how long that remained in a stationary position?

A. Approximately till the engine had passed near the end of the train. [377]

Q. Near the end of what train?

A. The train that was in on the siding.

Q. And then after that what did you do?

A. It was put back in the oscillating position.

Q. And was that before or after the accident?

A. Before the accident.

Q. So that at the time of the accident at the Howard Street crossing it was oscillating?

A. The Mars light was oscillating.

Q. Was the other light burning?

A. Yes, it was.

Q. Now, then, Mr. Kafer, directing your attention again to your approach to Anderson, can you tell us whether or not warning crossing whistles were sounded?

A. The warning whistles were sounded, yes.

Q. And can you tell us where that commenced and describe to us how those were sounded?

A. That was commenced a quarter of a mile, a prescribed signal post above the North Street crossing, and continued for each crossing.

Q. And as the—will you tell us whether or not it was continuous from the point you have described north of the North Street crossing down to the Howard Street crossing?

A. Yes, it was continuous.

(Testimony of Phillip S. Kafer.)

Q. And were there any whistles sounded even before that? [378]

A. Yes, there were for other crossings previous to that.

Q. For the crossing—what is the first crossing north of the North Street crossing?

A. That would be at the Signal Oil plant.

Q. And were there any—withdraw that.

Mr. Kafer, as you were coming into Anderson what was the first indication you had that there would be an accident?

A. The car driving up in front of the train.

Q. Approximately, the best you can tell us, where was the car when you first saw it?

A. I could not give you any approximate distance there. It just seemed to have driven up right in front of us.

Q. Was it in motion when you first saw it?

A. Yes, it was.

Q. Did it stop at any time after you saw it?

A. No, it did not stop.

Q. And did you have an opportunity to estimate its speed? A. I did not.

Q. And when you saw that automobile driving towards the crossing, that is, driving towards your track, what did you do?

A. First thing was to holler, "Hold them," to Mr. Stainbrook, the engineer.

Q. Did you do that immediately from seeing it?

A. I did.

Q. Now, will you tell us whether or not Mr.

(Testimony of Phillip S. Kafer.)

Stainbrook [379] immediately applied the brakes?

A. Mr. Stainbrook did apply the brakes immediately.

Q. And the automobile; describe to us, tell us what it did within your view. What did it do?

A. In that short time the automobile just drove up the crossing in front of us, disappeared in front of the engine.

Q. Disappeared from your view before or after the impact? A. Before.

Q. Now, then, after the impact and with the brake stopped in emergency, how far to your best judgment, how far did the train continue on over the crossing?

A. Approximately a half a mile.

Q. And from your experience as an engine man as the situation was then existing and having in mind the track conditions and equipment you had, was that a good emergency stop?

A. I would say it was a very good stop.

Q. Now, then, after the accident and after your train came to a stop, what did you do?

A. We got down and run around the engine to see what had happened.

Q. And did you make any observation at that time with respect to the headlights of the locomotive when you went around to the front?

A. Yes, I did.

Q. And what did you see? [380]

A. The Mars light was oscillating, the regular headlight on, and the bell was ringing.

(Testimony of Phillip S. Kafer.)

Q. And you made an observation then as to the bell, what about that?

A. The bell was ringing.

Q. What did you do after making those observations?

A. We took the door off the pilot of the engine, noting that the air hoses had been broken, and inspected the engine all around.

Q. Did you do anything with respect to the headlights or bell?

A. After inspecting the engine, we climbed back up in the cab, shut off the Mars headlight and shut the bell off.

Q. And was that before or after anybody arrived at the head end of the engine?

A. That was before anybody else.

Q. Now, from your position in the cab on the lefthand side of the locomotive, did you have an opportunity to observe whether or not the wig-wag on the Howard Street crossing was working or not?

A. No, I did not.

Q. Now, as you—I don't know whether we can fix this or not, whether I have asked it, but if I have you can tell me—did I ask you, could you estimate for us the approximate position of your locomotive at the time when you first saw the automobile? [381]

A. Well, as near as I could say would be by the train order post at the south of the station.

Q. South of the station?

(Testimony of Phillip S. Kafer.)

A. Right at the south corner of the station, in other words.

Q. What is the train order post, what is that post?

A. That is a post for giving us, letting us know whether we will receive orders at a certain station along our route.

Q. Is it the post that the orders are posted on or is it the signal showing that there are orders—I don't understand which.

A. It would be the signal indicating that there are orders.

Q. And now then, as you were approaching the crossing, and at that time can you tell us whether or not the warning whistle at that time, approximately at the time when you saw the train for the first time, whether the whistle then was blowing?

The Court: You said the train.

Mr. Phelps: I meant the automobile. If I did, I am sorry. I have a cold and a splitting headache and I can't be completely responsible for what I am saying.

The Witness: Would you state that——

Mr. Phelps: I will reframe the question. Withdraw that.

Q. As you were approaching the crossing there and when you yelled, "Hold it," can you tell us whether or not at that time, if you know, whether or not at that time the crossing [382] whistle was being sounded?

(Testimony of Phillip S. Kafer.)

A. It was being sounded for that approximately right around that time, yes.

Q. And for the other times that you have already told us about? A. Yes.

Mr. Phelps: You may cross-examine.

Cross-Examination

By Mr. Murman:

Q. Mr. Kafer, as I understand it, you have been a fireman with the Southern Pacific Company since 1941, is that correct? A. Yes, it is.

Q. And you have been at the Shasta Division all of that time? A. Yes, I have.

Q. Now, have you always been operating in the district from Dunsmuir to Gerber?

A. No, I have not. I have operated on other districts according to my seniority.

Q. How long prior to the accident had you been in the district from Dunsmuir to Gerber?

A. I believe it was in October.

Q. Of 1948? A. '48, yes.

Q. A matter of a couple of months, then?

A. Yes.

Q. And how often did you make the trip from Dunsmuir to Gerber [383] and return?

A. Every other day.

Q. And that was true at the time you mentioned from October till the time of the accident?

A. Yes, it is.

Q. So you passed through Anderson many times, is that correct? A. Yes, I have.

(Testimony of Phillip S. Kafer.)

Q. And you were familiar, were you, with the crossing there in Anderson and the right of way and the general surroundings in the neighborhood of the depot and all? A. Yes.

Q. You estimate the speed of the train to be between 65 and 70 miles an hour when you approached Anderson and Howard Street, isn't that correct? A. Yes, it is.

Q. Was that the normal speed of the train through there?

Mr. Phelps: I will object as to that being incompetent, irrelevant and immaterial as to what the speed was on other occasions.

The Court: Let him answer it.

A. Between 65 and 70 miles an hour would be normal speed.

Q. Wasn't it more often 65 miles an hour speed that you went through there?

A. I could not say that.

Q. You were late this morning? [384]

A. Yes, we were late.

Q. About 25 minutes?

A. I believe it was 25 minutes late out of Redding.

Q. Now, you talked about the two headlights, the Mars headlight and the standard headlight; you operated the headlights, as I understand it?

A. Yes, I did.

Q. When did you see the engine of the freight that was on the west siding?

A. I did not see it.

(Testimony of Phillip S. Kafer.)

Q. How did you know what to do about the headlights?

A. The engineer called that there was a "man in the hole" or a train on the siding.

Q. "Man in the hole?"

A. That is our railroad expression.

Q. And when you said "a man in the hole," what did you do?

A. That was the indication to stop the Mars to give them a chance to identify our train.

Q. And how would the identification occur, do you know?

A. Well, by the indicators on the engine.

Q. On your engine? A. Yes.

Q. Do I understand you to mean then by stopping the Mars from oscillating that would permit the engineer freight on the siding to see those boxes up at the front of your engine? [385]

A. The indicators are back about half way on the engine.

Q. On the passenger engine?

A. On a passenger engine.

Q. On the freight engines they are up by the funnel, is that right?

A. On the passenger—on the freight engines they are up in front of the cab.

Q. Your indicators are even forward of that position?

A. They are between the cab and the front of the engine.

Q. Yes, all right. So to permit the engineer of

(Testimony of Phillip S. Kafer.)

the—yes, he would be—the engineer on the right side, to see your train and identify it, you stopped the Mars from oscillating?

A. Well, the engineer of that train would not necessarily there are other members of the crew that could identify it.

Q. I appreciate that, by anyone in a position, a member of the train crew, to see your oncoming train, you stopped the oscillation of the Mars to permit the identification? A. Yes.

Q. Now with the Mars oscillating would that have blotted out the identification?

A. Yes, it would, momentarily.

Q. Yes, you call that dimming the lights?

A. No, that is not dimming it.

Q. Well, the purpose is to reduce the light area so that the engineer of the freight can see your identification, isn't [386] that correct?

A. Would be for any member to identify our train.

Q. Do you have an expression in the railroad parlance as to what you call that when you stop the Mars from oscillating? A. No.

Q. You don't have any "man in the hole" expression for that? A. No, we have not.

Q. Now, you knew, did you not, that you were approaching Anderson when you got that "man in the hole" call from Mr. Stainbrook, didn't you?

A. Yes, I did.

Q. And had you any time how far you were away from Anderson, that is, from the North Street

(Testimony of Phillip S. Kafer.)

crossing? A. No, not at that time I couldn't.

Q. Have you any way of approximating it as to whether it was a half mile, quarter mile or—was it south of that Signal station that you told us about?

A. I really don't know.

Q. Let me ask you this question: Was it after you started the bell ringing or before that you stopped the Mars from oscillating?

A. It would be after.

Q. After. So it was within that area you started your whistle and bell on the approach to Anderson, is that correct?

A. I started the bell, but not the whistle. [387]

Q. Limit it to the bell within the area where you started normally there, start the bell as you approach Anderson. A. Yes.

Q. Now, did you see the freight on the siding as you came into Anderson? A. I did not.

Q. From your position on the left side of that cab, how far would you say you could see in front of the engine to see the right of way?

A. I don't know how far you could.

Q. You have been a fireman now on this run for a couple of months and you have been a fireman since 1941; can't you tell us, seated on the left side of the cab, at what point you can see in front of the engine on the right of way right directly in front of the engine?

A. Oh, I guess approximately 750 feet.

Q. In other words, the obstruction of that boiler is such that you can't see the right of way ahead

(Testimony of Phillip S. Kafer.)

of you shorter than a distance of 750 feet in front of the engine, is that right?

A. Well, I don't know.

Q. Well, is that approximately right?

A. Approximately.

Q. And when you did look at the right of way from that position, you were looking at any angle to your own right, weren't you, seated on the left side of the cab? [388]

A. Yes.

Q. Now, you could see past that point on further to the right, couldn't you?

A. Oh, yes.

Q. And about what distance would the headlight beam light up the front of the engine normally?

A. I would say approximately between 800 and 1000 feet.

Q. Now, when the engineer called out "Man in the hole" to you and you stopped the Mars from oscillating, didn't you look down the track at that point—it was straight track, wasn't it?

A. Yes.

Q. And see the freight on the west side?

A. Probably seen part of it, yes.

Q. You saw part of it?

A. Saw part of it.

Q. Beyond the 750 foot point you mentioned?

A. Yes.

Q. And couldn't you see with the illumination that the headlight provided that it was blocking the North Street and Ferry crossings as you came into Anderson?

A. No, I could not. I was watching the crossings on my side approaching Anderson.

(Testimony of Phillip S. Kafer.)

Q. You were watching the crossings; didn't you also watch the full portion of the crossing that you could see? [389]

A. Yes, I watched that, but I couldn't see the train blocking the crossings, or tell which one it blocked.

Q. You couldn't see that. Was that due to the stopping of the oscillation of the Mars?

A. Speed you're moving.

Q. Due to the speed you are moving?

A. You couldn't—from my side, you couldn't tell which one of the crossing they were blocking.

Q. You say that was due to the speed at which you were moving? A. Could be.

Q. Wasn't it also due to the fact that you stopped the oscillation of the Mars?

A. I really don't know.

Q. Isn't it the purpose of the oscillating Mars to throw light on either side alternately from side to side instead of a single narrow headlight beam; isn't that the purpose of the oscillation?

A. Well, could be; yes.

Q. Well, when you are out in the open country and having oscillation, you can see a much further distance on either side than when you don't have it oscillating? A. Oh, yes.

Q. Of course you do. Therefore, by stopping its oscillation, the width of your illumination forward of the train down the track was narrowed to the single beam, wasn't it? [390] A. Yes.

Q. Now, you have said that you saw a car drive

(Testimony of Phillip S. Kafer.)

up in front of the train at the Howard Street crossing? A. Yes.

Q. Can you tell us what kind of a car you saw?

A. I cannot.

Q. How do you know it was an automobile?

A. Well, you just saw it for a flash drive up in front of you.

Q. You saw enough of it to see it was an automobile? A. Yes, I knew that.

Q. But you couldn't tell us whether you saw a sedan or convertible or what it was, is that right?

A. I could not.

Q. Can't tell us anything about whether it was—had headlights on or taillights, or any detail about it at all? A. No, I could not.

Q. Will you come down here and mark on this map where you were when you saw that automobile. You said you were south of the station at the train order post?

A. I'd better change that and say the south end of the station and train order board.

Q. Train order board? A. Yes.

Q. Well now, tell me again, you mean you were at the south end of the station? [391]

A. This train order board here (indicating) and the south end of the station.

Q. You understand the map; I think Mr. Phelps—— A. I understand it.

Q. This is the main line, this center track? (Indicating.) A. That is the center track.

Q. Will you mark on the main line as best you

(Testimony of Phillip S. Kafer.)

can you recall about where you were when you first saw the automobile?

A. See it approximately from in here in this area.

Q. Will you put a mark on there, put a little cross.

(Witness marks on map.)

Q. Between these two (indicating)?

A. I couldn't give you any exact distance.

Q. Well, the best of your recollection. You said now it was, as I understood it, south of the station at the train order post, you say now between the train order board and the south of the station?

A. Not south of the station; at the south end of the station.

Q. All right, you mark there.

A. Approximately be in here (indicating).

Q. All right. We will call that K-1; K is for Kafer. If you have been-in the service, we don't want you to be mixed up with K rations. Where was the automobile on the crossing when you saw it first?

A. I couldn't tell you. You are moving by the station, the [392] car drove out right over the crossing.

Q. You have told us it disappeared at the intersection. A. Yes, it did.

Q. That was before the collision?

A. That was before the collision.

(Testimony of Phillip S. Kafer.)

Q. After it disappeared in front of the engine before the collision, where did you see it before it disappeared?

A. Approximately in here, I would say (indicating).

Q. Will you mark where you saw it?

A. Right there (indicating).

Q. Darken that and we will call that K-2.

A. All right.

Q. As I understand, when you first saw the automobile it was at K-2 and you were at K-1?

A. Yes.

Q. According to your best recollection?

A. Best recollection.

Q. You can't tell us the speed of the automobile?

A. I could not tell you the speed of the automobile, no.

Q. Can you give us any idea how much time elapsed from the time you first saw the automobile when you were at K-1 and it was at K-2?

A. Approximately two or three seconds.

Q. Two or three seconds? A. Right. [393]

Q. Do you know how fast a train is traveling at 70 miles an hour? A. I have been told.

Q. Of course none of us know except what we have been told.

A. 105 feet a second, I have been told.

Q. 105 feet a second? A. Yes.

Q. You can't give us any estimate of the speed of the automobile at the time you saw it, but you

(Testimony of Phillip S. Kafer.)

saw it moving at K-2 and it disappeared in front of the engine on the crossing?

A. That is right. I wouldn't know anything about that.

Q. You say an interval of two or three seconds here elapsed? A. I would say so.

Q. Did you ever see the automobile again?

A. No, sir, I did not.

Q. When you got out of the engine and went around and looked at the pilot, you didn't go back and look at the automobile?

A. We are not able to go back. We stayed with our engine after the accident.

Q. That is part of your instructions, is that right?

A. That is part of our instructions, yes.

Q. I understand. As you were coming down and saw the automobile some 750 feet in front of the engine, according to your best estimate, the light from the first point, you didn't see any crossing signal at all? [394] A. I did not.

Q. Never saw it at all?

A. No, sir. I was looking for the crossing there.

Q. Did the station here get in the way of your vision as you were looking up the crossing tracks?

A. I did not see it until I was right approximately here.

Q. Directing the light from K-1 to K-2, that clears the station by considerable, doesn't it?

A. Yes.

(Testimony of Phillip S. Kafer.)

Q. Cleared this portion? A. Yes.

Q. If the car had been stopped in this area where you have marked K-2 and you had been further over, the station would prevent you from——

Mr. Phelps: I object to that as hypothetical.

Mr. Murman: It may be. It may be argumentative. I won't press it.

Q. (By Mr. Murman): Tell me, Mr. Kafer, where you were when you put the Mars light on for oscillation?

A. The oscillator light was near the caboose.

Q. You mean you could see on the west side where the caboose was? A. I didn't.

Q. How did you know you put the light on as you went by the caboose? [395]

A. Well, you could tell by the sound.

Q. By sound? A. By sound.

Q. You mean the noise——

A. As your train passes along these boxcars you get a sound and as you get by the sound is a little different.

Q. As the sound of your moving train changed you concluded you went by the caboose?

A. Yes.

Q. Did you put on the Mars light for oscillation?

A. I did.

Q. That would be before you saw the car, wouldn't it? A. Yes, it was.

Q. Can you tell us here about where you started

(Testimony of Phillip S. Kafer.)

the Mars light oscillating again, having in mind that this is Ferry Street, the Ferry Street crossing to the north and here is the station to the south?

A. Well, I have a recollection of the Mars headlight flashing on the edge of the station.

Q. Which edge?

A. This edge (indicating).

Q. The west edge?

A. Well, you could call it the west edge, yes.

Q. About where the order board was?

A. Well, I don't know the exact spot. [396]

Q. I know, I don't want it with exactness. After all, this was a year ago, was it not?

A. That is right. The exact spot I couldn't say, but you could see it flashing on back and forth on this station.

Q. Was it north of the station?

A. It would be to the north of the station, yes.

Q. It was somewhere after you passed the end of the caboose and before you got to the north end of the station?

A. It could be.

Q. You said you didn't turn it on until you passed the caboose?

A. Yes.

Q. You believe the first thing you saw in the flashing was this northwest side of the station, is that right?

A. Along there.

Q. Or would it be somewhere between?

A. Between that and the crossing.

Q. And you can't tell us about where?

A. No, sir, I cannot.

(Testimony of Phillip S. Kafer.)

Q. You didn't have anything to do with the whistle operation, did you? A. No, I did not.

Q. You may take the stand again.

When you took that door off the pilot of the engine, did you look at it at all?

A. We saw it was bent around what they call the cutting level, and took it off. [397]

Q. The cutting level is on the pilot, is it?

A. It is on the pilot, yes.

Q. The door was bent around it?

A. It was bent around it, yes.

Q. The glass, I suppose, was shattered?

A. There was no glass, just the shell of the door.

Q. Just a shell of a door? A. Just a shell.

Q. You can't tell us anything about the window in the door at all? A. No, I couldn't.

Q. Do you have any recollection as to whether the speed of the train slackened at all as you came into Anderson? A. No, I have not.

Q. Are you familiar with the rule that you people have about showing the headlights as you pass the head end of a train that is on the siding?

A. We have a rule.

Mr. Phelps: If Your Honor please, that rule would be the best evidence.

Mr. Murman: All right.

Mr. Phelps: And I should like to see whatever it is.

Mr. Murman: That is the Southern Pacific rules, Mr. Phelps.

(Testimony of Phillip S. Kafer.)

Mr. Phelps: I don't know them. I didn't write them. [398] Which one is it, Mr. Murman:

Mr. Murman: 17-C.

Q. Mr. Kafer, I show you Rule 17-C of the Southern Pacific Rules and Regulations, Transportation Department, dated February 15, 1943, which is Plaintiff's Exhibit 1 for identification, and ask you if you are familiar with Rule 17-C.

A. Yes.

Q. That had to do with changing the headlight beams, doesn't it? A. Yes, it does.

Q. Now,—

Mr. Phelps: Before you go further with that, I should like to interpose an objection as to the rule on the ground that it is incompetent, irrelevant and immaterial, wouldn't establish any issue of this case, remote, and having nothing to do with this case.

Mr. Murman: I have no objection to Your Honor's looking at it. It is Rule 17-C (handing to Court). It takes in subsections C and E.

Mr. Phelps: My point is that the rule has no bearing on any issues, wouldn't tend to establish any negligence on the part of the defendant Southern Pacific Company in respect to this accident down here on Howard Street. It only applies to something, if it applies at all, and I don't think it has anything to do, but if it did, it would apply to something too [399] remote. Nothing to do with this accident, couldn't possibly establish any negligence.

Mr. Murman: Of course, you are familiar with

(Testimony of Phillip S. Kafer.)

the rule, Mr. Phelps, that they are admissible where the facts show that there has been an infraction.

Mr. Phelps: If the evidence is material to some issue.

The Court: Yes.

Mr. Phelps: It wouldn't establish any issue as between the parties.

The Court: It would have to be, it seems to me, an infraction bearing on this case. However, it seems immaterial to me, but I will allow it.

Mr. Phelps: That was my point, Your Honor.

Q. (By Mr. Murman): You are familiar with this rule that requires that:

"When the rules require headlights to be displayed, electric headlights on road engines will be dimmed to the front, except when nearing street or highway crossings—except when nearing street or highway crossings, as follows: when approaching stations where other trains are standing; when passing head end and ear end of trains on adjoining tracks." A. That could be, yes.

Q. You were on this side approaching the station and were passing the head end of the freight, but you were also nearing [400] the street or highway crossing, were you not? A. That is right.

Q. It was after you changed that Mars light back to oscillation that you first saw the car at K-2, isn't that right? A. Yes.

Q. Your best estimate. A matter of two or three seconds elapsed between the time you saw the car at

(Testimony of Phillip S. Kafer.)

K-2 and the car disappeared in front of the engine?

A. Yes.

Q. When you say it disappeared in front of the engine, do you mean the entire vehicle disappeared?

A. Drove across from out of my vision.

Q. You didn't see it at the time of the collision, then?

A. I did not, no.

Q. By the way, what kind of day was it on this particular day, a year ago yesterday?

A. Sort of misty.

Q. Could you see the mist?

A. Well, no, you couldn't.

Q. How did you know it was misty?

A. Different places coming out of Redding along there, there had been mist.

Q. Wasn't there an accumulation of dampness on your storm window?

A. I don't know if there was. [401]

Q. You had a storm window on the left side just the same as the right?

A. Yes. Probably a little on there, yes.

Q. You don't have any wipers, you use a storm window?

A. Use a storm indow.

Q. Was there an accumulation of mist on the storm window?

A. I don't recall if there was or not.

Q. Well, you were looking through it, weren't you?

A. Yes.

Q. Can you tell us whether there was dampness or drops of water or some accumulation of moisture on that window?

(Testimony of Phillip S. Kafer.)

A. I had wiped the window off.

Q. Where had you done that?

A. Redding.

Q. At Redding? Did you wipe it again before the accident?

A. Oh, I imagine once or twice, yes.

Q. When you say you imagine, you mean that is your best recollection?

A. That is the best recollection I have, yes.

Q. You are not just imagining things? You are trying to tell us what you remember?

A. I am trying to tell you what I remember.

Q. You say once or twice? Can you tell us, according to your best recollection again, now, about where it was the last time, about where you were on the track the last time you [402] wiped the storm window off?

A. I couldn't tell you.

Q. But you do remember that there was sufficient moisture accumulated on that storm window to require you to wipe it off once or twice between Redding and Anderson?

A. Well, yes.

Q. And your speed all that time was about constant, was it?

A. Well, it would average according to the contours of the land.

Q. Isn't it a generally down grade from Anderson to Redding?

A. Up and down, yes.

Q. But mostly down?

A. You have a little.

Q. As you come into Anderson?

(Testimony of Phillip S. Kafer.)

A. Downgrade there, yes.

Q. How about the lighting conditions? What was the condition of the light? A. Dark.

Q. It was dark? Was it dark up to the time that the engine came to a stop a half mile beyond the crossing? A. Yes.

Q. Of course, when you got out and looked at it in the headlight, you could see it clearly in the darkness, is that right? A. Yes, we could.

Q. Did you see any flagmen in the vicinity of this crossing [403] as you approached it this morning, speaking of the Howard Street crossing now?

A. I did not.

Mr. Phelps: I make the same objection, Your Honor. I know Your Honor's ruling.

Q. (By Mr. Murman): That was a 15 car train, was it?

A. I don't remember the number of cars. I think around 15.

Q. Do you remember whether it had a name or not, or was it just train 13?

A. I believe it was called the Beaver.

Mr. Murman: I have no further questions from this witness.

Redirect Examination

By Mr. Phelps:

Q. Mr. Kafer, in addition to this switch which controls the oscillating of the Mars light, your head-

(Testimony of Phillip S. Kafer.)

lights have another switch to control the amount of the light within the headlight, is that correct?

A. Yes, it does.

Q. That is called a dimming, is that correct?

A. That is.

Q. When you dim the light, it is like on an automobile?
A. That is right.

Q. Less candlepower?
A. That is it.

Q. That is the only thing that has reference to, is that [404] correct?
A. Yes.

Q. You did not dim the light in that sense?

A. I did not dim it in that sense, no.

Q. The only thing——

The Court: As I read the regulation, it didn't require it, anyway.

Mr. Phelps: It didn't require it anyway, but I thought we better cover it 100 per cent, since Your Honor permitted it in.

Q. Now, then, Mr. Kafer, in the cab of the locomotive, and where you were seated, your seat is alongside—your seatbox has an armrest to your left, does it not?
A. Yes, it does.

Q. To your left there is an open window, is there not?
A. Yes.

Q. There is no glass in that window of any kind?

A. Not in the window itself, no.

Q. The only open window that you were looking out of and leaning out of? Is that in the operation of the locomotive, both fireman and engineer?

A. Yes.

(Testimony of Phillip S. Kafer.)

Q. That is where you look for your view?

A. Yes.

Q. The storm window has the effect of deflecting wind and mist [405] and rain around you, is that right?

A. Yes.

Q. So that in looking out you can look ahead without interference from mist and rain?

A. Yes.

Q. You find that is the effect? So that on this occasion as you were approaching Anderson you were looking out of the open window without any glass whatsoever?

A. Yes, I was.

Q. Now, then, you were asked with reference to the beam of the headlight when you directed the beam of the headlight directly down the track—that is, the Mars light—there are two, one above the other, is that correct?

A. That is right, yes.

Q. Both directed down the line. And you were asked about this narrow beam. Does it, as it goes out, spread out, does it not?

A. Yes.

Q. So that it doesn't just encompass the track itself?

A. No.

Q. In addition to what other purposes there may be as to the Mars light, one of the purposes of an oscillating light is to attract attention of people, motorists, and so forth, isn't that right?

A. Yes, it is.

Q. Other than a still light which doesn't have so much tendency [406] to attract attention?

A. Yes.

(Testimony of Phillip S. Kafer.)

Q. Now, then, Mr. Kafer, you were asked with reference to watching the righthand side of the track—it would be on the engineer's side?

A. That would be the engineer's side.

Q. In the ordinary operation of the locomotive, and was it or was it not true on this occasion, that the fireman, and you as a fireman, were charged with the duty of looking to the left at crossings to see traffic, and so forth? A. Yes, I was.

Q. You divide the duties and responsibilities in that regard? A. Yes.

Q. So that your attention is always directed to the left rather than to the right? A. Yes, it is.

Q. And down the track.

A. Down the track, yes.

Q. Can you tell us whether or not in your experience as a fireman, whether or not in looking out and down the track, and ahead, for approaching vehicular traffic on crossings, whether or not you would keep your eye centered down in the watching, not only at Howard Street crossing, but also the crossing beyond? A. Yes. [407]

Q. It is your duty to watch both crossings?

A. Be watching all crossings, yes.

Mr. Phelps: I have no other questions.

Recross-Examination

By Mr. Murman:

Q. Mr. Kafer, you say there were two switches for the headlights? A. Yes, sir.

(Testimony of Phillip S. Kafer.)

Q. Where were they located in the cab?

A. Right over the cab, right up on my side near up above the window.

Q. Are they rocker switches or open?

A. No, it had a sort of a toggle switch and the other, the Mars light, has a sort of a quadrant.

Q. Did you look up to grasp the Mars switch when you turned the oscillator back on?

A. No, my hand was on the Mars switch.

Q. Did you have your hand on the Mars switch all the time?

A. During the time going by the train, yes, because it is much easier if you have your hand on it, on the grip, to flick it than it would be down here and look around up. That would distract your attention.

Q. You can't use your left hand as you showed us?

A. Yes.

Q. That is the side that is out toward the open window, isn't it? [408]

A. Yes.

Mr. Murman: No further questions.

Mr. Phelps: I have no further questions. May this witness be excused, Your Honor?

The Court: Yes.

Mr. Murman: I have no objection.

Mr. Phelps: You may be excused.

Call Mr. George Thomas.

GEORGE W. THOMAS

called on behalf of the defendant; sworn.

The Clerk: Q. State your full name to the Court and jury, please.

A. George W. Thomas.

Direct Examination

By Mr. Phelps:

Q. Mr. Thomas, where do you live?

A. At Dunsmuir, California.

Q. How long have you lived there?

A. Nine years.

Q. Now, by whom are you employed?

A. Southern Pacific.

Q. How long have you been employed by the Southern Pacific Company?

A. Nine years altogether.

Q. In what capacity? [409] A. Brakeman.

Q. Other than working for the Southern Pacific Company, have you had any experience with any other railroads? A. Yes, I have.

Q. Now, then, in December—December 27, 1948—were you then engaged in your occupation as a brakeman for the Southern Pacific Company?

A. Yes, sir.

Q. And at that time do you remember what division you were working on?

A. Shasta Division.

Q. Do you still work on the Shasta Division?

A. I do.

Q. Had you worked on the Shasta Division the

(Testimony of George W. Thomas.)

entire nine years you worked for the Southern Pacific Company? A. Yes, sir.

Q. Now, then, Mr. Thomas, I direct your attention to December 27, 1948, and ask you if you recall an incident in which there was an accident in which a Mr. Shanahan was killed at the Howard Street crossing. A. I do.

Q. First, will you tell us whether or not you saw that accident? A. I did not.

Q. Now, then, Mr. Thomas, on that morning a member of what [410] crew were you?

A. I was swing brakeman with conductor Griffith.

Q. Conductor Griffith had what train?

A. Second-618.

Q. Is that a passenger train or freight train?

A. Freight train.

Q. Will you tell us where that train was when it came into Anderson?

A. It was at the siding.

Q. Will you step down to the map, please.

(The witness left the witness stand.)

Q. This is the station. This is in the direction of Redding, and I am pointing to the right. It is left on the map, toward Red Bluff. A. Yes.

Q. The main line track has been identified the east main line here. To the west of that is what appears to be a passing track, then there is a track adjacent to the station and east of the main line.

A. Yes.

(Testimony of George W. Thomas.)

Q. Will you indicate which track your train was on? A. We were on this one here.

Mr. Phelps: Indicating, may it please the Court, for the record, the passing track to the west of the main line.

Q. Now, Mr. Thomas, do you remember from which direction you [411] had come?

A. Yes, we came from the west.

Q. You are using railroad directions again. Railroad west to you means——

A. Northwest.

Q. Toward San Francisco, is that right?

A. That is right.

Q. Will you try to use geographical directions?

A. All right, sir. We had came from the west.

Q. From the west and proceeding north?

A. Yes.

Q. In the direction of Redding?

A. That is right.

Q. Now, as you came in, then, your train came in on the main line I am now indicating on the map.

A. Yes, sir.

Q. Then to that siding on the switch on the map?

A. Yes, sir.

Q. And went on it? Will you resume the stand?

(The witness resumed the witness stand.)

Q. Do you remember approximately how many cars you had that day?

A. I believe it was 99, if I remember correctly.

Q. Now, your job, you said, was swing brakeman. Will you tell us what a swing brakeman does? [412]

(Testimony of George W. Thomas.)

A. That is the man that takes charge and supervision of movement of the train, inspection, and so forth, does switching.

Q. So that there is a head man, rear man and swing man? A. And the swing man.

Q. And the swing man goes between——

A. The whole entire train.

Q. Now, as best you can, as you came into the siding, will you tell us—can you fix, first, if you can, the location of the caboose after you came to a stop? First, I am assuming you did. I am getting ahead of myself. When you came to the siding, what did you do?

A. As soon as the train came to a full stop, I got off the caboose.

Q. I mean, what did the train do? What did you do? A. Stopped at the siding.

Q. Do you know what the purpose of that stop there was?

A. For the meeting of three trains.

Q. About how long did your train remain at the siding there at Anderson? A. About an hour.

Q. During that time how many trains came by from a northerly direction? A. Three.

Q. Now, then, as you took the siding, can you tell us approximately where, if you can, your caboose came to a stop. About [413] where was it with reference to the Ferry Street crossing or the station? A. About the station.

Q. I beg your pardon?

(Testimony of George W. Thomas.)

A. It was about the station, where the caboose stopped.

Q. And to your recollection, can you tell us, then, after it came to a stop what did you do? In the first place, where were you? Where were you riding when you came in?

A. Riding in the caboose.

Q. Riding in the caboose? After it came to a stop, what did you do?

A. Got off the caboose, went down to the crossing below, and I waited around there at the cars to see if I was going to have to cut that crossing or not till the train went by.

Q. When that first train went by, was that a passenger train, freight train, or what was it?

A. It was a passenger.

Q. Do you remember what the number of the train was? A. No. 11.

Q. Now, what were your duties with respect to a train coming in, coming south, meeting yours? What were your duties in respect to that train?

A. We always check, check the indicators to see if it was the train we were meeting.

Q. You did that on this occasion? [414]

A. I did, sir.

Mr. Phelps: I see. It is 11:00 o'clock, Your Honor. This is as convenient a place as any to stop.

The Court: Recess for ten minutes, and during the recess bear in mind the admonition heretofore given you.

(Recess.)

(Testimony of George W. Thomas.)

Q. At the recess, Mr. Thomas, we had talked about 11 coming through. Now, as the train, No. 11, went by, was there another train before the No. 13? A. Yes.

Q. What kind of a train was that?

A. Two light engines and the caboose.

Q. And did you observe that train?

A. I did.

Q. And when you saw that approaching what did you do?

A. Started over to the train to inspect my train.

Q. On the—to inspect the running and so forth of your train? A. Yes, sir.

Q. After that train went by, what was the next train that came through? A. No. 13.

Q. All right now, as 13 came into view, where did you first see—what was the first thing that attracted your attention that 13 was coming into Anderson?

A. I saw headlights coming around a curve out of Garvain.

Q. What kind of a headlight was it that you saw?

A. Well, he had two headlights, the regular headlight and the Mars lights.

Q. And at that time was either or both lights stationary, or one moving?

A. One was moving. [415]

Q. Now, how far away is the point Garvain, or a curve where you first saw the locomotive headlight from where you were? A. Four miles.

(Testimony of George W. Thomas.)

Q. I beg your pardon? A. Four miles.

Q. And where were you at that time?

A. I was up about 35 cars when I first saw the headlights from the caboose.

Q. Now, we have been using car lengths. You had a freight train? A. Yes, sir.

Q. What do you normally, you railroad men, mean by a car length with reference to a freight train car length?

A. Well, it is the only way we have to tell our location, if we are asked.

Q. Well, how long is a car length?

A. It varies from—different length, some 40 feet, some are 50 feet.

Q. All right. And what is about the average?

A. Average about 45.

Q. That differs from the length of passenger cars? A. It does, sir.

Q. Now, as you saw the train approaching, as you described it, at any time while it was in your view, did you see any change in the—anything on the engine? [416] A. Not until he got close.

Q. And what happened?

A. The Mars light went stationary for the main line about a half a mile beyond our engine.

Q. Now then, it is part of your duties—did you have any duties with respect to checking that train?

A. Yes, it is our duty to check all trains.

Q. And can you tell us whether or not the train
13 as it came into Anderson and after it passed you

(Testimony of George W. Thomas.)

going through Anderson, were any crossing whistles sounded? A. Yes, they were sounded.

Q. Approximately where, as you now remember, were the whistles sounded?

A. Just as he passed on through, he started sounding for the North Street crossing.

Q. For the North Street crossing?

A. Yes.

Q. And thereafter did he continue to sound whistles? A. Yes.

Q. And were any whistles sounded for any crossing north of the North Street crossing?

A. Yes.

Q. Now, so far as you are concerned, you have already told us you didn't see this accident?

A. I did not. [417]

Q. Now, when was it that you first learned that there was an accident?

A. As I got on the caboose, pulled out of the siding, the conductor told me.

Q. How long was that after 13 passed?

A. Approximately three or four minutes.

Q. You learned about the accident from whom?

A. From the conductor.

Q. By that time will you tell us whether or not your train was pulling out of the siding and on your way?

A. We were out on our way, we had cleared the main line.

Q. The front end of the train——

(Testimony of George W. Thomas.)

A. The whole train.

Q. You got on——

A. I got on at the switch.

Q. What was the state of the weather as you recall it?

A. It was cloudy and misting rain.

Q. Had been raining that night?

A. It had.

Q. Was it raining at that time?

A. Just misting.

Q. Just misting. And so far as darkness or light, how was that?

A. Well, it was still dark.

Q. Had dawn broken? [418]

A. Just starting to break.

Mr. Phelps: I have no other questions.

Cross-Examination

By Mr. Murman:

Q. Mr. Thomas, No. 11 was the Cascade, wasn't it? A. Yes.

Q. You said the caboose stopped at about the station. Could you come down here to this map and mark the rear of the caboose as you recall it? You understand the map? Mr. Phelps explained it to you, I believe.

A. I do. Somewhere in here (indicating).

Q. Will you mark a cross according to your best recollection as to the rear of the caboose?

(Witness marks on map.)

(Testimony of George W. Thomas.)

Q. I will darken that. I will call that T-1.

A. Yes.

Q. Thank you.

Mr. Murman: I have no further questions.

Mr. Phelps: I have no further questions.

The Court: That is all for you.

Mr. Phelps: May this witness be excused?

The Witness: Thank you.

Mr. Phelps: Call Mr. Griffith. [419]

LUTHER L. GRIFFITH

called as a witness on behalf of the defendant,
sworn.

The Clerk: Will you state your full name to the
court and jury, please?

A. Luther L. Griffith.

Direct Examination

By Mr. Phelps:

Q. Will you state your full name, please?

A. Luther L. Griffith.

Q. And where do you live, Mr. Griffith?

A. Dunsmuir, California.

Q. And how long have you lived there?

A. I have lived there 30 years.

Q. By whom are you employed?

A. Southern Pacific Company.

Q. And in what capacity?

A. As a conductor.

Q. Before being employed as a conductor, what

(Testimony of Luther L. Griffith.)

was your capacity with the Southern Pacific Company? A. As a brakeman.

Q. When were you first hired as a brakeman?

A. In September 9, 1919.

Q. And since that time have been continuously employed either as a brakeman and then as a conductor? A. Yes, sir.

Q. When were you promoted to conductor? [420]

A. 1926.

Q. And on what division are you employed?

A. Shasta Division.

Q. The entire time? A. Yes, sir.

Q. Now, then, Mr. Griffith—in December, 1948, December 27, 1948—do you remember an accident in which an automobile was struck at the Howard Street crossing in Anderson in the morning?

A. Yes, sir.

Q. Now, on that morning, you were a member of what crew? A. Train second, 618.

Q. How many cars did you have?

A. As near as I recall, 99 cars.

Q. Freight train or passenger?

A. Freight train.

Q. And in which direction had you come from?

A. We had come from Gerber going east on the railroad—

Q. Geographically which direction?

Mr. Murman: Any time the witnesses say east, I will stipulate it is north.

Mr. Phelps: I know—

A. It would be north.

(Testimony of Luther L. Griffith.)

Mr. Murman: That is as to operation of trains only.

Mr. Phelps: That's right. [421]

Don't have any difficulties, your Honor, only two direction, and a train can come from only one direction, and you can't get mixed up that way.

Q. All right, now, as you came in to the—into Anderson, will you tell us whether or not your train was required to stop?

A. Yes, sir, it was required to take siding.

Q. Take siding, what do you mean by that?

A. To clear the main track to let trains by, or to meet trains.

Q. And do you remember how many trains you had to meet?

A. We had three trains to meet there.

Q. From which direction were they coming?

A. They were coming from the north.

Q. From the north. And you were also, I take it, familiar with this map. I would like to have you come down and look at it—you are familiar with the area—and look at the map. I want to point out to you—this is, it is not marked as such—this is the Howard Street crossing, this is the station, to the right of the map is in the direction of Redding, left of the map is in the direction of Gerber, and three tracks shown on here, the center track is what track? A. Main track.

Q. Now the track which is on the highway side, the side away from the station, is what track? [422]

A. Is the siding.

(Testimony of Luther L. Griffith.)

Q. The other tracks shown here on the station side, what is that?

A. That is known as the house track.

Q. All right. When you took the siding, you took then which track?

A. I took this track (indicating).

Q. Indicating the west track? A. Yes.

Q. And the other house track, is that long enough to hold 99 car freight train? A. No, sir.

Q. Will you resume the stand, please?

Now, Mr. Griffith, after your train came in the siding and it came to a stop to wait for the trains—— A. Yes.

Q. Now, will you tell us approximately, to the best of your recollection, where your caboose stopped?

A. Well, the best of my recollection, the caboose had stopped just north of the last mark you have on that map.

Q. Well, come down and mark it for us, will you, where you think the caboose stopped?

A. To the best of my recollection, my caboose would probably fit right in here (indicating).

Q. All right. You have marked a cross on there, we will make [423] it a little blacker and make a line and call this G-1, and that indicates the spot where you think your caboose was approximately?

A. Approximately in that locality.

Q. Now will you resume the stand?

How long did your train remain in the siding at Anderson in that position?

(Testimony of Luther L. Griffith.)

A. As near as I remember, about an hour.

Q. When the first of those trains came through of the three that you were to meet, do you remember approximately what time, or don't you know?

A. I don't know.

Q. That was after you had taken the siding a train came through; was that a passenger?

A. The first train came through was a passenger train, No. 11.

Q. No. 11. Now, when that train came through, where were you? A. I was on the ground.

Q. And whereabouts on the ground?

A. Behind the caboose.

Q. And as that train came through did you make any observation as to the operation of the wig-wag signal at the Howard Street crossing?

A. Yes, sir.

Q. And will you tell us whether or not it operated? A. It was operating. [424]

Q. Will you tell us whether or not you saw the oscillating or wig-wagging, whatever?

A. It was wig-wagging, as they call it.

Q. Was the bell ringing? A. Yes, sir.

Q. Was the light on? A. Yes, sir.

Q. All right. After that train passed, what was the next thing that happened?

A. The next train that came through was two light engines, and a caboose.

Q. Now, tell us with reference to those what, if anything, they did?

(Testimony of Luther L. Griffith.)

A. They stopped and the conductor went to the telephone.

Q. Where did they stop?

A. They stopped with the caboose at the station platform.

Q. And did you go over to the caboose or did you stay where you were?

A. I started to the caboose, but they left before I got in the caboose.

Q. All right. Now, then, and while that train was stopped, they were still on the main line?

A. It was on the main line, yes, sir.

Q. And incidentally, No. 11 came through on the main line? A. Yes, sir. [425]

Q. Now, when that train stopped and did you make any observation as to whether or not the wig-wag signal at the Howard Street crossing was operating?

A. The wig-wag signal were operating.

Q. Now, approximately to the best of your recollection, about how long was that prior to the accident?

A. To the best of my recollection, between 10 and 15 minutes.

Q. And you told us, you say that this was not a regular train, the second one?

A. No, it was an extra train.

Q. What did you use, the term "caboose hop"?

A. Caboose hop.

Q. That is an enginee and a caboose?

(Testimony of Luther L. Griffith.)

A. Or more than one engine and a caboose.

Q. This had two engines and a caboose?

A. Two engines and a caboose.

Q. Now, Mr. Griffith, directing your attention to the last train that came through, what train was that? A. That was No. 13.

Q. Now, where were you when that train came through?

A. I was behind the caboose when the train came through.

Q. Now, before that—first, where were you when you first saw that train?

A. I was on the station platform.

Q. And that would be then on the east side of the main track? [426] A. Yes, sir.

Q. And what was it that attracted your attention that the train was coming?

A. I saw the headlights coming.

Q. At the time you saw it, do you know whether or not they were stationary or oscillating?

A. It was oscillating.

Q. And at any time after you first observed it, was there any change in that condition?

A. Yes, sir, when the 13 passed the caboose, two headlights were centered for the track.

Q. Now, you were on the station platform when you first saw it; you were behind the caboose when the train went by? A. Yes, sir.

Q. Some time in there you must have changed your position. Will you tell us when and how you did it?

(Testimony of Luther L. Griffith.)

A. Well, as near as I remember the train No. 13 was probably a thousand to 1500 feet before the train reached me, I crossed over.

Q. And what was the purpose in crossing over?

A. Well, to be behind my train and to get an indication as we have to check indicators on all trains we meet on the road.

Q. Now, were you intending to stay there for any other trains? A. No, sir.

Q. So that as soon as 13 cleared, you were ready to go out of [427] town? A. Yes, sir.

Q. Then as you resumed your position, or took your position behind the caboose on the passing track, was anyone with you?

A. A rear brakeman which now is not in service, as near as I can find out.

Q. What is his name? A. Johnson.

Q. You say he is not in service?

A. Not in service.

Q. You haven't seen him, you don't know where he is? A. No, sir.

Q. Then will you tell us as best you can, as you were standing there behind the caboose, the train went by; first, can you tell us whether or not you made any observation as to whether the wig-wag was working? A. The wig-wag was working.

Q. This was as 13 was approaching the crossing?

A. No. 13.

Q. Now, then, did you see the accident?

A. Yes, sir.

Q. You did. [428]

(Testimony of Luther L. Griffith.)

Q. Will you tell us, then, what you saw first of the automobile?

A. I saw the automobile approaching the crossing.

Q. All right, and approximately how far from the main line then was it when you first saw it?

A. I would estimate between 30 and 40 feet.

Q. At that time was it moving or standing still?

A. It was moving.

Q. Did you have an opportunity to estimate its speed?

A. Well, I would estimate his speed at about 8 or 10 miles an hour.

Q. As you saw that automobile approaching, did it ever stop before the collision?

A. From my viewpoint, I don't think it did stop.

Q. Well, did you see it stop?

A. I didn't see it stop.

Q. Were you looking at the train or did you have an opportunity to determine whether or not the locomotive was, rather, where the locomotive was when you first saw the car?

A. I didn't quite understand that question.

Q. All right. You first saw the automobile, I believe, when it was between 30 and 40 feet from the mainline?

A. Yes.

Q. It was moving then?

A. Yes. [429]

Q. Have you any way of telling us, if you can—have you any way of telling us where the locomotive was at that time, or were you looking at it?

(Testimony of Luther L. Griffith.)

A. I was looking directly at the locomotive at that time.

Q. Prior to that time, prior to seeing the automobile, had you made any observations as to the headlights of No. 13 as it was approaching?

A. Yes, sir.

Q. You have already told us about that. All right. Now, then, prior to seeing the automobile had you made any observations as to whether or not any passing whistles were sounded by No. 13 as it was approaching Anderson?

A. The whistles were being sounded continually while coming up the main track.

Q. From how far back, continually?

A. Well, I would estimate a half a mile.

Q. And where with reference to the North Street crossing?

A. Well, the North Street crossing, I couldn't say. That was farther down in the train.

Q. Well, at least a half mile from where you were?

A. Before reaching that North Street crossing.

Q. Before reaching the North Street crossing? Now, then, do you remember whether or not there were any whistles sounded when 13 approached the head end of the train on the siding?

A. I couldn't say. [430]

Q. Now, then, after the impact what did you do?

A. After the impact?

Q. Yes.

(Testimony of Luther L. Griffith.)

A. I didn't do anything. We were leaving the siding at that time.

Q. The train was already in motion?

A. Well, just started about the time of the impact.

Q. You had to catch your train and you went on out? A. Yes.

Q. Did you have any occasion prior to the seeing of the automobile which you saw, did you observe the operation of the wig-wag at the Howard Street crossing?

A. Yes, sir, I observed the wig-wag when I was on the station platform.

Q. That was before you crossed over?

A. And before I crossed over.

Q. Did you make any observation as to whether or not the bell was ringing on the wig-wag?

A. I could hear the bell ringing.

Q. You could? A. Yes, sir.

Q. Did you make any observation as to whether or not the light was on on the wig-wag when you were on the station platform?

A. Well, I couldn't say for sure. I think they were. [431]

Q. And also as to whether or not it was oscillating back and forth? A. It was oscillating.

Q. All right, after you crossed over and were standing there behind the caboose, did Mr. Johnson also, after the accident, get aboard?

A. Yes, sir.

Q. Where did Mr. Thomas get aboard, if you

(Testimony of Luther L. Griffith.)

remember? You know Mr. Thomas, the swing brakeman?

A. I think Mr. Thomas boarded the train at the east switch on the north end of the siding.

Q. Did you tell him that there had been an accident at that crossing? A. Yes, sir.

Mr. Phelps: That is all. You may cross-examine.

Cross-Examination

By Mr. Murman:

Q. Mr. Griffith, it was dark when you got to the siding, was it not?

A. Yes, just breaking day.

Q. It was just breaking day when you got to the siding or when you left it?

A. It was dark when we got to the siding and when we left the siding it was just breaking day.

Q. You were there about an hour, you estimate?

A. About an hour. [432]

Q. You can't tell us now about what time it was when you got on the siding, as I understand it?

A. No, sir, I can't tell you just what time it was.

Q. It was dark? Was the weather misty that morning?

A. The weather was misty and it had been raining.

Q. Had been raining? And how was the temperature?

A. I didn't look at the temperature.

Q. Well, were you dressed in warm clothes?

(Testimony of Luther L. Griffith.)

A. Well, I couldn't answer that question.

Q. This was a year ago December, this December. You have been a conductor, brakeman, and so forth on that Shasta Division for a long time. What do you know about the temperature there at 6:00 o'clock in the morning up in that area?

A. Well, may I explain that question, your Honor?

The Court: Yes.

A. It all depends about this warm clothes what we would—what you would call warm clothes. We wouldn't and what you don't call warm clothes we do, because we wear a lot of wool.

Q. Were you wearing a lot of wool that day?

A. Evidently.

Q. You had on your long ones, eh?

A. No, never wear them.

Q. When the train stopped on the west siding, your freight train, you got out of the caboose, is that right?

A. Yes, sir. [433]

Q. And you put a mark here, they call that "G-1," about the rear of the caboose.

A. Just about the rear of the caboose, yes, sir.

Q. You stood there, did you, or what did you do?

A. Oh, I moved around different locations.

Q. That was before No. 11 showed up?

A. Yes, sir.

Q. And when did you first notice No. 11 coming into view?

A. Right after we got there on the siding, or in the clear of the main track.

(Testimony of Luther L. Griffith.)

Q. Right after you got on the siding you noticed No. 11 coming into view? A. Yes, sir.

Mr. Murman: By the way, I have a train dispatcher's sheets here, Mr. Phelps, that shows No. 11 went through Redding at 7:03 that morning, or 7:02, and left at 7:03, is that it?

Mr. Phelps: I think that is undoubtedly correct. That is Anderson?

Mr. Murman: No, this is Redding. That would be north of Anderson. In other words, it would be even later at Anderson. Around 7:00 o'clock.

Mr. Phelps: Yes.

Q. (By Mr. Murman): Does that refresh your memory, Mr. Griffith, it was a little after 7:00 when No. 11 came into view? It was right after you got out of the caboose that you [434] saw No. 11?

A. Yes.

Q. That is the Cascade, by the way, isn't it?

A. We just call it by No. 11.

Q. You don't give them any fancy names?

A. No fancy names.

Q. You were coming around in the vicinity of the rear of the caboose, is that right?

A. That is right.

Q. When did you first look toward the Howard Street crossing?

A. Oh, a number of times, just walking around.

Q. I mean in relation to No. 11, now. We are talking about No. 11. When did you first look toward the Howard Street crossing?

(Testimony of Luther L. Griffith.)

A. I couldn't just tell you when I first looked, but I remember looking a number of times.

Q. Was there anything down that way particularly attracted your attention? A. No, sir.

Q. So when you looked that way it was just in the normal course of looking about, is that correct?

A. That is right.

Q. Now, you have told us that as you were at the rear of this caboose where you have marked G-1, you saw the wig-wag at Howard Street crossing operate as No. 11 came into Anderson, [435] is that correct? A. Yes, sir.

Q. When did you first notice it was operating?

A. When we were heading in the siding and before we cleared the main track.

Q. That is your train, now? A. Yes.

Q. We will go past that now. When did you first notice it was operating as No. 11 came into Anderson?

A. Well, apparently when the headlight looked between the switches, that is, between the siding switches at Anderson.

Q. Are you talking about the so-called house track? A. The siding.

Q. The siding? That is the west siding?

A. That is the west track, sir.

Q. You said the headlights looked like it was between the switches? A. Yes.

Q. Was your train occupying the entire siding with the exception of the distance between the caboose and the south switch? A. Yes, sir.

(Testimony of Luther L. Griffith.)

Q. You had 99 cars, I believe? A. Yes.

Q. The engine and tender, of course, would be an additional unit? [436] A. Yes, sir.

Q. 100 units in all?

A. Well, they aren't known by units in steam engines.

Q. Pardon me if I call it that way, but you had 99 cars plus the engine and tender?

A. And caboose.

Q. Oh, the caboose is extra, too? A. Yes.

Q. I see. The average length, I think you said, of all cars is around 45 feet. Of course, the engine was longer and the caboose would be about the same length, wouldn't it, the caboose about 35 to 40 feet, and the engine is a longer unit—pardon me if I use that expression. A. Yes.

Q. The first time you saw the signal was when No. 11 was halfway between the switches, according to your best estimate? A. Yes.

Q. What attracted your attention to the wig-wag? A. What?

Q. What attracted your attention to the wig-wag?

A. Well, it is customary that on the cars I have, we kind of protect crossings when we are there around where we kind of block them or anything, and we notice all that stuff for our own benefit and for the benefit of the public.

Q. Then you were paying particular attention to the wig-wag, [437] is that correct? A. Yes.

(Testimony of Luther L. Griffith.)

Q. I see. Then it was dark, was it not?

A. Yes.

Q. And misty, isn't that right? A. Yes.

Q. And contrary to the way this wig-wag is drawn here—you have seen it, haven't you?

A. Yes.

Q. It is actually upright and wig-wagging this way (indicating), not up and down this way (indicating), isn't that correct?

A. That is correct.

Q. You were here looking at the profile of it, weren't you?

A. No, I was looking at the wig-wag.

Q. Well, you were looking at the standard that the wig-wag was on? I show you Defendant's Exhibit A which is a picture of the wig-wag looking north. Isn't that about the profile you saw from where you were up here back of the caboose?

A. Well, a number of times, if I may——

Q. Just answer the question. Then you can explain it. Isn't that about the profile you looked at, only you looked from the other direction?

A. Well, I wouldn't say because a number of times I was on the station platform.

Q. I know, but we are talking now about the time you were back [438] of the caboose here and No. 11 coming down there. I guess it was coming—have you any idea of the speed of it?

A. No, I haven't.

Q. Well, was it 60 miles an hour or less or more?

A. Well, I couldn't say.

(Testimony of Luther L. Griffith.)

Q. No, but you have been a railroad man for many, many years, since 1919, I think. That is right, isn't it? 30 years. Can't you tell us your estimate of the speed No. 11 was coming as she came through there?

A. I would estimate the speed of No. 11 between 65 and 70 miles an hour.

Q. No. 11 come down there between 65 and 70 miles an hour, and you were here back of G-1 and you were looking generally toward the south. Isn't that about what you saw, the profile of that wig-wag, just reversing the picture?

A. From where I was standing you could see the wig-wag and see that the wig-wag was working.

Q. All right. All right, I am not saying you aren't testifying to seeing the wig-wag working at Anderson. When you were looking at it, didn't you look at the profile of it as shown in that picture, only on the other side, on the reverse side of it? I just want to know if you weren't looking at the profile.

Mr. Phelps: I think he doesn't understand what profile is. I don't know.

Q. (By Mr. Murman): Do you know what a profile is? [439] A. No.

Q. I am sorry. Look at me. This is my profile.

A. Yes.

Q. Now, you are looking full at me.

A. Yes, sir.

Q. Here is a full view of the wig-wag?

A. Yes, sir.

(Testimony of Luther L. Griffith.)

Q. There is a profile view of it, looking at it from the south? A. Yes, sir.

Q. Is that what you saw when you looked at it from the north? A. Yes, sir.

Q. All right. I am sorry, I didn't understand that you didn't understand me. If you don't understand me at any time, say so, because, after all, we want to understand each other.

You were in this same general position back of the caboose, as I understand it, when No. 13 cleared at the time that you stated that you saw the wig-wag working as No. 13 came through?

A. That is right.

Q. Is that right?

A. No, I was on the station platform when No. 13 was approaching the Anderson station.

Q. That is correct. I understand.

A. At that time I had almost a clear view of the wig-wag. [440]

Q. Oh.

A. As 13 approached the caboose, I crossed the main track over behind the caboose.

Q. In front of 13? A. Yes, sir.

Q. I see. Where was No. 13 about the time you crossed from the station platform over to the caboose?

A. Well, as you have marked it, store crossing, 13 was north of that crossing yet.

Q. North of the store crossing, which on here is called North Street crossing?

(Testimony of Luther L. Griffith.)

A. North Street crossing.

Q. You have seen the North Street crossing, have you?

A. Have I seen the North Street crossing?

Q. Yes. A. Yes.

Q. You say it was north of the North Street crossing? A. Yes.

Q. How far north, approximately? Approximately how far?

A. Well, I would estimate it about 500 feet.

Q. 500 feet. So that when you crossed from the station platform over to the caboose, No. 13 was about 500 feet north of the North Street crossing?

A. Yes, sir.

Q. And when you got over to the caboose, where was No. 13? [441]

A. No. 13 was between the North Street crossing and the caboose.

Q. And the caboose? That would be between North Street and G-1? A. Yes, sir.

Q. Was it coming at about the same speed as you estimated the Cascade coming?

A. Yes, sir.

Q. As you were back of the caboose here about, here, I believe you said, you looked at the Howard Street crossing and saw the wigwag, is that right?

A. Yes.

Q. And both as to No. 11 and No. 13, were bells ringing those two locomotives as they came down to the crossing? A. Yes.

(Testimony of Luther L. Griffith.)

Q. Was it one of those dang-dang-dang-dang-dang-dang-dang bells, like that?

A. I don't remember that.

Q. It isn't a swing bell, is it? It is a clapper bell?

A. I don't remember. Different engines have different types bells.

Q. Didn't you hear it?

A. You could hear it.

Q. Was it a dong-dong-dong-dong-dong-dong-dong bell? A. I don't remember. [442]

Q. Do you remember the old type bell that had a piston that swung back and forth and went dong-dong-dong? A. Yes.

Q. This was a newer type?

A. The old type, if it gets spinning, will dang-dang-dang, too.

Q. You mean when it does a loop?

A. Yes.

Q. That is when the fireman gives it too much steam and it gets going 'round and 'round. This was a modern engine on the Cascade and the Beaver, was it not, new engines with Mars lights on? A. Yes.

Q. So that it didn't have an old piston bell, did it? A. I couldn't say.

Q. But you did hear a bell ringing.

A. I did hear a bell ringing.

Q. And when you remember hearing the bell ringing on the engines as they entered—let's take the Cascade, first. About the Cascade engine, when

(Testimony of Luther L. Griffith.)

you heard the bell ring, about where was it at the time?

A. It was in the vicinity of the caboose.

Q. You didn't hear it before it got to the vicinity of the caboose? A. I don't think so. [443]

Q. That is your best recollection?

A. That is my best recollection.

Q. How about the Beaver? How about No. 13? Where did you pick up the bell on that?

A. I think past the caboose.

Q. Past the caboose? You didn't hear the bell before that? A. The whistle was blowing.

Q. No, I am asking you about the bell, now.

A. No, sir.

Q. You never heard the bell until it got past the caboose? A. I think it was past the caboose.

Q. When it was past the caboose you heard the bell? A. Yes.

Q. It was just before that you had gone over behind the caboose? As I remember it, you said the engine was halfway between the caboose and the North Street when you got behind the caboose, is that it? A. As an estimate.

Q. Yes, as an estimate, that is right. And you heard the bell as it passed the caboose. When you saw the automobile, I think you stated it was about 30 or 40 feet east of the main line.

A. East of the house track.

Q. East of the house track? You said it was going eight or ten miles an hour? [444]

(Testimony of Luther L. Griffith.)

A. Yes, I estimate about 8 or 10 miles an hour.

Q. Where were you—well, let me make this a little bit clearer. Will you come down here and put a cross on about where you saw the automobile when it was going 8 or 10 miles an hour?

(The witness left the witness stand.)

Q. I am asking you of the automobile. Where was the automobile?

A. The automobile was in here (indicating).

Q. Was right there. Will you mark there a cross? All right, we will darken that a little bit. I see we already have G-1. We will call this G-2. Where were you when you saw the automobile at G-2? A. About 30 feet behind the caboose.

Q. 30 feet behind the caboose, and that G-1 is the caboose, is that right? A. That is right.

Q. Was that after you had crossed over from the station platform that you were at G—that should be called G-3. You were at G-3 and saw the automobile here at G-2?

A. After I had crossed from this platform.

Q. Did you watch the automobile?

A. Not continually. I may have, something else may have attracted my attention. At the time No. 13 passed the caboose, we are in a position to read the indicator on the engine, then move back so we won't get into it if something should [445] fall off the train as it passed.

Q. What do you remember about this automobile? What kind of automobile was it?

(Testimony of Luther L. Griffith.)

A. I couldn't tell you.

Q. What did you see about it that caused you to identify it as an automobile?

A. Headlights.

Q. It had headlights on, did it? A. Yes.

The Court: It is 12:00 o'clock gentlemen. We will take the usual recess until 2:00 o'clock. In the meantime, ladies and gentlemen, bear in mind the admonition the Court has heretofore given you. Recess to 2:00 o'clock.

(Thereupon an adjournment was taken to 2:00 o'clock p.m.) [446]

December 28, 1949, at 2:00 o'Clock

LUTHER L. GRIFFITH

resumed the stand, previously sworn.

Cross-Examination

(Continued)

By Mr. Murman:

Q. Mr. Griffith, I think just before the noon hour you were telling us about seeing Mr.—or an automobile over here at G-2 and you at that time were over here at G-3; I think that is correct, isn't it? A. Yes, sir.

Q. Now, you said you saw the automobile because of its headlights, I think that is what you said attracted your attention to it?

A. Yes, sir.

Q. Did you see more than one automobile?

(Testimony of Luther L. Griffith.)

A. Not at that time.

Q. At a later time did you see——

A. No, sir.

Q. At any time did you see more than one automobile? A. No, sir.

Q. Did you see where this automobile that you placed at G-2; you said it was in motion at the time you saw it. Did you see where it went?

A. I noticed it was an automobile when 13's engine hit it.

Q. You saw here at G-2 and next saw it when No. 13 engine [447] hit it? A. Yes, sir.

Q. Now, where was it when you saw the engine hit it?

A. It was—I will have to explain that because Mr. Johnson, the brakeman, was standing with me at the rear of the caboose. I made the remark to him, "If that is a sedan automobile, it hit about the back door of the car, right there in the front—back of the front seat."

Q. You mean, I suppose, by telling us your remark to Mr. Johnson—by the way, he is the brakeman who has left the service? A. Yes, sir.

Q. That you actually saw the engine hit it at about that spot? A. Yes, sir.

Q. Now, when the collision occurred, you were still at G-2, were you not? A. Yes, sir.

Q. And you were looking then at the right side of train No. 13 as it went south? A. Yes, sir.

Q. And you, from your position at G-2, saw the

(Testimony of Luther L. Griffith.)

collision at a point where the train you said hit a little bit to the rear of the right front door?

A. Yes, sir.

Q. Now, will you come down here and mark on this map about [448] where the car was when you saw the engine hit the car a little to the rear of the right front door?

A. Well, the car was on this crossing right here (indicating).

Q. You put a dot there; is that a correct cross as to the dot? A. As near as I can recall.

Q. Yes, all right. I will mark that then G-4. Now, Mr. Griffith, that is where you saw the locomotive hit the automobile, is that correct?

A. Yes.

Q. And the point of contact as you marked it here was at the rear of the right front——

A. Right rear of the front seat.

Q. Right rear of the front seat?

A. Yes, sir.

Q. And you don't know whether it was a sedan or coupe that was hit?

A. No, sir, I didn't know at the time.

Q. Now, did you see the automobile momentarily before the engine hit it? A. No, sir.

Q. Where were you looking at this point before the engine and the car came into collision? I say this point, I mean the G-4 point you designated.

A. Yes, sir.

Q. And what attracted your attention to that point? [449]

(Testimony of Luther L. Griffith.)

A. I made the remark to the rear brakeman——

Q. Just tell me what attracted your attention, not the remark.

A. This car was not stopping when it should, as I figured.

Q. Now, when you told me you couldn't see it from the time you saw it at G-2 until you saw it at G-4; did you see it somewhere in between?

A. No, the engine shut my view off from this point to that point.

Q. Then you don't know, as a matter of fact, do you, that the car did or did not stop in between because you didn't see it?

A. I couldn't say positively.

Q. You didn't see it between those two points, is that right? A. That's right.

Q. But I asked you what caused your attention to be directed at this point.

A. I just happened to turn and look at that point.

Q. I see. If you will take the witness stand again.

Now, between the time, Mr. Griffith, that you saw the car at G-2 and you then later saw it, the collision at G-4, did you remain in the position back of the caboose that you had gone to?

A. Yes, sir.

Q. And you were looking generally in a southerly direction that entire time, is that correct?

A. Yes, sir. [450]

(Testimony of Luther L. Griffith.)

Q. And as you were doing that, the train came along and the engine shut off your view of the east side of the right of way, is that right?

A. That's right.

Q. And the next thing you saw was when the train actually hit the automobile? A. Yes, sir.

Q. Yes. Now, have you any way of specifying as an approximation, not exactly, how much time elapsed while you were at G-3 between the time you saw the automobile here at G-2 and you saw the collision at G-4?

A. I couldn't say exactly.

Q. Well, I don't want you to say exactly, because I am sure anyone standing there couldn't tell you exactly, but I would like an approximation if you can give it to us.

A. I would estimate between one and two minutes.

Q. One and two minutes?

A. One or two minutes, an estimation.

Q. Now, I want to be fair with you, I want to be fair with you. You realize that each minute has 60 seconds in it, don't you? A. Yes, sir.

Q. All right. And you realize, do you not, that this train coming was going 105 feet a second, 70 miles an hour?

A. I don't know what distance he traveled.

Q. But you said you approximated it between 60 and 70 miles [451] an hour; I think it has been testified here that it is 105 feet a second. Now, I

(Testimony of Luther L. Griffith.)

don't want to put you in an awkward position——

A. May I correct it? One or two seconds.

Q. That is what I thought you had in mind. Your best estimate is then it was one or two seconds between the time you saw the car here and when you saw the collision there (indicating)?

A. Yes, sir.

Q. And did you see what happened to the car when the engine hit it?

A. No, I couldn't say just what happened to the car.

Q. Did you see anything in the way of disturbance at the time of contact?

A. I seen lots of fire flying.

Q. You saw lots of fire flying. Could you tell us when you saw the car here, just at the time of the collision, or momentarily before it, whether it still had its headlights on?

A. Yes, sir, it still had its headlights on.

Q. Headlights still on. Now, at the time the collision occurred, was your train starting to move?

A. My train started to move about the time, or just a little after the time, the car was hit.

Q. So the movement of the freight northward was almost concurrent with the actual collision here at the crossing?

A. Yes, sir. [452]

Q. And as I understand it, you swung aboard your caboose and went up towards Redding?

A. Yes, sir.

Q. Did you have your full crew on board, so far as you know, everybody got on board?

(Testimony of Luther L. Griffith.)

A. What we call the swing man, the third brakeman, was up along the train.

Q. You picked him up?

A. We picked him up and pulled out.

Q. Now, when you saw the car at G-2, did you continue to look at it until the moving engine cut your view off from it? A. Yes, sir.

Q. So that when you saw the engine then it was because it came in between you and the car here, G-2? A. That's right.

Q. Did you hear any whistle in this area of the station at the crossing as the train cut off your view?

A. The whistle was blowing continually.

Q. Tied the cord down?

A. Placed as a crossing whistle.

Q. The whistle was being blown continuously.

A. That is with spacing of a crossing whistle.

Q. Well, I suppose by that you mean it was blown separately for each crossing, but continuously as the crossings were approached? [453]

A. That's right.

Q. At least that is what you heard?

A. That is what I heard.

Q. Yes. By the way, when did you last see Mr. Johnson, the brakeman who is missing?

A. That is the last time I saw Mr. Johnson, was that trip that he made with me.

Q. You don't know when he actually left the service of the railroad?

(Testimony of Luther L. Griffith.)

A. He is not in the service at Dunsmuir at this time.

Q. But you don't know when he left?

A. I don't know when he left.

Mr. Murman: I have no other questions.

Redirect Examination

By Mr. Phelps:

Q. You referred to the spacing of a crossing signal. In the blowing of a crossing whistle, is there one continuous sound or is it broken up into shorts and longs?

A. Broken up into shorts and longs.

Q. So that when you say the spacings, what have you in mind then, what do you mean to indicate to the jury? What is a crossing whistle, what is—how is it sounded; how many shorts and how many longs?

A. One long, a short and two longs.

Q. One long, a short and two longs?

A. Yes. [454]

Q. That is done for each crossing?

A. Each crossing.

Q. Now then, directing your attention to the time, if I understand it, you were over on the station platform, that would be on the east side of the track as 13 was coming down the track?

A. Yes, sir.

Q. Now, when you were over there on the station platform, directing your attention to that time

(Testimony of Luther L. Griffith.)

and when you were not looking at the wig-wag and what Mr. Murman describes as a "profile" view, directing your attention to that time when looking at it diagonally, rather than end on, can you tell us whether or not you could observe the light of the wig-wag burning at that time?

A. I am positive that the light of the wig-wag was burning at that time.

Q. All right.

Mr. Phelps: I have no other questions.

Recross-Examination

By Mr. Murman:

Q. Well—the train was coming down the track when you were standing here on the platform and you say you saw the light burning?

A. I think I was—I crossed over the track before or at the time the train was from 1000 to 1500 feet away from me.

Q. I think you testified before lunch that you, as you crossed [455] over, the train was about 500 feet beyond or north of the North Street crossing; I think if I remember your testimony correctly?

A. That's right.

Q. Now, at the time you looked over, you say you saw the light burning here in the wig-wag. Was the train just beyond that point; did you immediately cross over after you saw that?

A. I couldn't say just exactly the point the train was at when I crossed over.

(Testimony of Luther L. Griffith.)

Q. You have already fixed that, Mr. Griffith, on that 500 feet point, but what I am asking you is, before you crossed over, now, while you were still on the platform, can you tell us how far the train was north of the North Street crossing?

A. I couldn't say just how far it was.

Q. But you crossed over immediately, did you, when you say you saw the signal over here and went over to G-3, did you? A. Yes, sir.

Mr. Murman: No further questions.

Mr. Phelps: I have no other questions.

Mr. Phelps: May this witness be excused, your Honor?

Mr. Murman: Yes.

The Court: All right, you are excused.

Mr. Phelps: Call Mr. Andree. [456]

ALEX M. ANDREE

called as a witness on behalf of the defendant, sworn.

The Clerk: Will you state your name to the court and jury, please?

A. Alex M. Andree.

Direct Examination

By Mr. Phelps:

Q. Mr. Andree, where do you live?

A. Anderson.

Q. How long have you lived in Anderson?

A. Well, we have been in business in Anderson about 20 years.

(Testimony of Alex M. Andree.)

Q. And what is your business in Anderson?

A. It is soft drinks, ice cream, and we also handle beer and a few groceries, crackers and stuff like that, pies, cakes.

Q. Is that your own business or are you employed by somebody?

A. No, it is my own business.

Q. Do you have a little store that you operate at Anderson, in the town of Anderson?

A. That's right.

Q. And how long have you run that store in Anderson?

A. About 20 years.

Q. Mr. Andree, in living in Anderson for 20 years, can you tell us whether or not you, during that time, have become acquainted with Mrs. Nelda Shanahan?

A. Yes.

Q. And how long have you known her? [457]

A. Why, I have known Mrs. Shanahan ever since she was a small girl.

Q. And were you acquainted during his lifetime with Mr. Ellis Shanahan?

A. I knew Mr. Ellis Shanahan.

Q. And how long have you known him?

A. I have known Mr. Shanahan perhaps 20 years since I have lived in Anderson.

Q. Mr. Andree, will you tell us where your store is located?

A. It is about the center of the town of Anderson, right on the highway.

Q. What highway is it, 99?

A. 99.

(Testimony of Alex M. Andree.)

Q. And where with relation to Ferry Street?

A. I didn't get you.

Q. Ferry Street, do you know where Ferry Street is?

A. About 200 feet below, south of us. We live about half way between Ferry and North Street, that is one block.

Q. I see. You say Ferry Street is 200 feet south of your store? A. That's right.

Q. And your store fronts right on the highway 99? A. That's right.

Q. Now, Mr. Andree, will you step down here and see this, you can help us here. This is a map which, while it has nothing on the highway side of the town of Anderson, it shows the [458] station. You recognize that, and it shows the Howard Street crossing here (indicating), Ferry Street crossing with the firehouse opposite it, and over here is the North Street crossing with the store up there.

A. Yes.

Q. Your store then is located somewhere between Ferry Street and North Street about 200 feet north of Ferry Street?

A. Well, it is about the center, would be about the center of the block, maybe not quite.

Q. Maybe not quite. Will you indicate to us where approximately your store is with relation to Ferry Street and North Street on the highway?

A. We probably would be—let's see, there is—we're probably right in here somewhere (indicating).

(Testimony of Alex M. Andree.)

Q. You have indicated right on the track. Do you mean in relation this way it is about that far away north of Ferry Street (indicating)?

A. That's right.

Q. And of course up on the other side of the highway? A. Yes.

Q. All right now, where did you indicate south of Ferry Street? Will you do that again so I won't be in any error here?

A. Let's see, this is Ferry Street, isn't it, here (indicating)?

Q. Yes.

A. Well, we be about right in here somewhere (indicating). [459]

Q. Now then, hurrying that line up, your store would be somewhere in this area in here?

A. Just about.

Q. Will you put a dot approximately where you think it is?

A. Well, near as I can (indicating). There is a garage in there. I would say we was right here (indicating).

Q. All right, I will make a dot there. Mr. Andree, I am going to go over that dot to make it larger and draw a cross there. I am drawing out a line from that and marking it A-1 to indicate the approximate place of your store. A. All right.

Q. Will you take the stand again, now?

Mr. Andree, do you remember the morning of December 27, 1948, when Mr. Ellis Shanahan was

(Testimony of Alex M. Andree.)

involved in an accident down at Howard Street in his automobile; do you remember that occasion?

A. I do.

Q. On that day, Mr. Andree, approximately what time had you gone to your store to open up?

A. Well, I usually come in there about 7:00 o'clock and do my sweeping, sweep the sidewalk.

Q. All right.

A. And do a lot of work inside, you know. Around 7:00 o'clock I generally have the door open, probably a little later.

Q. Now then, can you tell us whether or not you observed the [460] approach and passing through of the train No. 13 southward through Anderson?

A. Yes, there was a freight on the siding.

Q. And you remember 13 coming through?

A. I remember 13 coming through.

Q. Can you tell us approximately what time that was?

A. Well, it was around between, I would say, half past seven, quarter to eight, probably a little before that, about my opinion what it was—I know it was late that morning.

Q. All right. As that train came down, came into Anderson, what was it about that train that attracted your attention to it?

A. Well, the whistles.

Q. The whistles. And what kind of whistles did you hear and where were they?

A. The first I heard was a station whistle, I

(Testimony of Alex M. Andree.)

guess what they call it, for the town, the first one, that big long whistle for the station.

Q. Did you hear a whistle for any crossings north? A. Another crossing above there——

Q. I am sorry——

A. (Continuing): They whistled for that crossing.

Q. What crossing is that?

A. That is the one between—there is two crossings up there between—between Spring Creek. There is one crossing this [461] side and another crossing between the Signal Oil, the crossing there and the next crossing is North Street.

Q. All right, did you hear the train blow for those crossings? A. I did.

Q. You did. And did you hear the train blow for the other crossings in the town of Anderson?

A. Yes, he blew for North Street and the time he got down to Howard Street he opened her up again on Ferry Street, and it was still, still whistling when I walked into the house. I didn't pay much attention. I know there was a freight train to pull out, the whistle was still blowing out after he went through Ferry Street and I went inside.

Q. You went inside?

A. I went inside. I didn't pay no more attention to it.

Q. Can you tell us whether or not you saw the accident? A. I didn't see the accident.

Q. Now then, when did you first learn that there was an accident?

(Testimony of Alex M. Andree.)

A. Well, about a quarter to eight, or eight o'clock, one of the boys from the mill stopped in and told me there had been an accident, but I didn't know who it was at the time.

Q. Now, between that time, the time when you heard that train going through Anderson and the time when you were advised that there was an accident, did any other trains go through the town of Anderson? [462]

A. None that I seen.

Q. Now then, Mr. Andree, with reference to the train in the siding, freight train in the siding, can you tell us whether or not the cars of that train were freight cars or passenger cars?

A. They were freight.

Q. And can you tell us whether or not they were mixed cars?

A. Well, some up front and here between North Street were mixed cars; most of them were box cars there.

Q. Were some of them flat cars and gondolas?

A. I think so.

Q. Yes. Now then, Mr. Andree, as train 13 came through, did you at any time see the headlights of the train?

A. Yes, I noticed the headlights.

Q. And were they burning?

A. Well, I could see the top of the light over the other cars, they were still burning.

Q. And could you see that through the freight train and as it passed by the mixed train, the gondolas?

(Testimony of Alex M. Andree.)

A. Down the line there is quite a swell and you can see the engine, see the lights on the engine.

Q. Can you tell us whether or not the headlight on the locomotive cast a beam of light ahead?

A. Straight ahead as far as I noticed.

Q. And can you tell us whether or not you heard the train [463] before you saw the headlight?

A. Well, I heard the whistle.

Q. Now, Mr. Andree, so far as you are concerned and confining yourself strictly to what you saw that morning, did you or did not observe the wig-wag in that direction?

A. What light?

Q. The wig-wag down on Howard Street; do you know whether or not it was working? Did you pay any attention to it?

A. Well, they haven't—they had one at Howard Street, one on North Street was working——

Q. I am talking about Howard. Do you know whether or not it was working, did you look in that direction?

A. On Howard Street, no, I couldn't see that far, see, I went inside.

Q. And you didn't look in that direction?

A. The North Street wig-wag was working.

Q. Did you look in that direction after the train passed in front of you?

A. Toward North Street?

Q. No, towards Howard Street.

A. Yes, I could.

Q. But did you, is the point.

A. What is it?

(Testimony of Alex M. Andree.)

Q. Did you on that morning look down the track in a southerly direction? [464]

A. No, I didn't turn around and went inside after the train went by.

Q. So you made no observation one way or the other? A. That's right, I didn't.

Q. Now, Mr. Andree, do you have any recollection in addition to the blowing of the whistle, do you have any recollection of hearing the engine bell? A. Yes, the bell was ringing.

Q. You can remember that?

A. Yes, it was ringing.

Q. And you did hear it?

A. I heard it, all through the little bells on the signal part on the North Street.

Mr. Phelps: I have no other questions.

Cross-Examination

By Mr. Murman:

Q. You say you heard the bells on the North Street? A. Yes, got a wig-wag there.

Q. Did you hear any bell coming from the direction of Howard Street?

A. No, I couldn't hear that, I didn't pay no attention to it. That is a little too far away.

Q. You weren't paying special attention to the North Street crossing lights, were you?

A. What? [465]

Q. You weren't paying special attention to——

A. No, I wasn't paying much attention to it,

(Testimony of Alex M. Andree.)

only I say the lights and the whistle and the bell.

Q. You did hear the bell from North Street?

A. Yes.

Q. But you didn't hear any coming from Howard Street?

A. I didn't pay no attention. I know the North Street was ringing.

Q. You weren't paying attention to North Street, were you?

A. Well, but you could hear it, it was much closer.

Q. You could hear it. You say you saw just one headlight?

A. Just the top beam.

Q. Just the top beam?

A. Couldn't tell one or two, one headlight straight ahead.

Q. Was shining down on the track?

A. Well, you know about the beam of a locomotive.

Q. No, I don't know about the beam of a locomotive. You mean it was shining ahead of the train?

A. It was shining ahead of the train, yes.

Q. Was it misty that morning, or clear?

A. No, it wasn't misty. It was, well, it was about the weather we have got now.

Q. We don't live up there, Mr. Andree.

A. Well, it is cold, I know, and——

Q. Hadn't it been raining? [466]

A. I think it rained the night before, or a day or two before. I have forgotten now.

(Testimony of Alex M. Andree.)

Q. You are sure this is the December 27 that you are remembering about? A. Yes, December.

Q. December 27, 1948? A. Yes.

Q. You are sure you got the right day in mind?

A. I got the right day, it was in December.

Q. No doubt about that? A. December.

Q. Of course there are a lot of days in December.

A. Yes, but I couldn't—I have just forgotten what day it was.

Q. How long after Christmas was it?

A. I just have forgotten, whether it was two or three days——

Q. You don't remember whether it was two or three days after Christmas? Has there been more than one accident at Howard Street?

A. No, it was before Christmas.

Q. Before Christmas? A. I think.

Q. More than one accident at the Howard Street crossing?

Mr. Phelps: I will object as incompetent, irrelevant and immaterial. [467]

Mr. Murman: The witness is talking about an accident that he didn't see.

Mr. Phelps: Ask him if it was the accident in which Mr. Shanahan was killed. He knows Mr. Shanahan. Fix it that way. I object to any other evidence, if your Honor please.

The Court: You can clear it up on redirect.

Q. (By Mr. Murman): Did you understand the question, Mr. Andree? A. I didn't hear it?

(Testimony of Alex M. Andree.)

Q. Were there other accidents at that Howard Street crossing? A. There have been.

Q. And you are not sure whether this was before Christmas or after Christmas that you are talking about; is that right?

A. It was before Christmas.

Q. You are sure of that? A. Yes.

Q. Before Christmas a year ago?

A. Before Christmas.

Mr. Murman: No further questions.

Redirect Examination

By Mr. Phelps:

Q. Now, Mr. Andree, you are clear on one thing, are you, this is the accident in which Mr. Ellis Shanahan was the man who was killed, is that right? [468]

Mr. Murman: Just a moment. This witness testified he didn't see the accident. This calls for hearsay.

The Court: Oh, overrule the objection.

Mr. Phelps: Will you read the question, Mr. Reporter?

Mr. Murman: The Reporter who has the question is just leaving the room.

Mr. Phelps: I will reframe the question, if your Honor please.

Q. You are clear on this, are you not, that the accident that you are testifying about was the accident in which Mr. Ellis Shanahan, a man you know,

(Testimony of Alex M. Andree.)

and knew before this, was killed on that morning?

A. That is right.

Q. No question in your mind about that?

A. That is right.

Q. Regardless of whether it was a day or two before Christmas or a day or two after Christmas?

A. That is right.

Mr. Phelps: I have no further questions.

Recross-Examination

By Mr. Murman:

Q. You didn't see the accident, did you?

A. No.

Q. Did you go down and look at the automobile afterwards?

A. I didn't know anything about it until about 8:00 o'clock. No, I didn't go down. [469]

Q. All you know is what somebody told you, is it?

A. What somebody told me.

Mr. Murman: That is all.

Redirect Examination

By Mr. Phelps:

Q. I take it, it was pretty common knowledge in the town of Anderson that Mr. Ellis Shanahan was killed?

Mr. Murman: Oh, I object to that, if Your Honor please.

The Court: Well, I will allow it. He asked you, it was common knowledge in the town that Mr. Shanahan was killed?

A. Yes.

(Testimony of Alex M. Andree.)

Q. (By Mr. Phelps): This was the day of the accident of which it was common knowledge in the town of Anderson that Mr. Shanahan was killed?

A. That is right.

Mr. Phelps: No further questions.

Mr. Murman: No further questions.

Mr. Phelps: May this witness be excused?

Mr. Murman: No objection.

Mr. Phelps: Oh, by the way, you came here pursuant to subpoena, did you not? I forget to ask you.

A. What?

Q. You came here pursuant to a subpoena?

A. That is right. [470]

JOHN HENRIS

called on behalf of the defendant; sworn.

The Clerk: Will you please state your name to the Court and jury?

A. John Henris.

Direct Examination

By Mr. Phelps:

Q. Mr. Henris, where do you live?

A. Klamath Falls.

Q. How long have you lived there?

A. Eight years.

Q. Now, Mr. Henris, what is your business or occupation?

A. Conductor on the Southern Pacific.

Q. How long have you been employed as a conductor on the Southern Pacific?

(Testimony of John Henris.)

A. 23 years as a trainman, 13 years as a conductor.

Q. When were you promoted to conductor?

A. 13 years ago.

Q. Prior to that as a brakeman, is that right?

A. That is right.

Q. Had you had any other railroad experience before that? A. No.

Q. What division have you worked on?

A. Coast division and the Shasta Division.

Q. When did you first go to work on the Shasta Division? A. 1941. [471]

Q. Trade your rights with somebody else——

A. That is right.

Q. ——on the Coast Division for the Shasta Division? A. That is right.

Q. Mr. Henris, on December 27, 1948, can you tell us whether you were a member of a crew involved in an accident at Anderson, California, when Mr. Shanahan was killed? A. I was.

Q. What was your position in that crew?

A. I was conductor.

Q. What was your train number?

A. No. 13.

Q. Where had you gone on duty that day?

A. Klamath Falls, Oregon.

Q. And where were you headed for? What was your terminal point, that is, as conductor?

A. Gerber.

Q. Gerber. Now, then, Mr. Henris, do you remember the number of cars you had that day?

(Testimony of John Henris.)

A. We had 15 cars.

Q. Do you remember how many of those cars were head end equipment?

A. We had two head end cars, five coaches—let's see, one lounge and a diner.

Q. And the rest were Pullman? [472]

A. Pullmans.

Q. Now, what do we mean by head end?

A. They are baggage cars, have baggage and mail and express.

Q. And no other cars? A. No.

Q. Now, then, Mr. Henris, coming out of Redding, will you tell us approximately what time in the morning it was when you left Redding, if you know? A. Oh,—

Q. If you don't remember, that is all right; I will try to fix it.

A. I don't remember right now.

Q. But at any rate, on the morning of the 27th; after your train had left Redding and was approaching Anderson, where were you riding in the train?

A. I was back in the eighth car, the lounge car.

Q. What were you doing back there?

A. I went back there to get a ticket from a passenger that got on at Redding.

Q. Were you doing anything else in connection with that, doing any work?

A. No. I was talking to him just there, no work.

Q. All right, then, what was your first indication,

(Testimony of John Henris.)

to you, that there had been an accident on the train on which you were riding? [473]

A. Well, I felt the brake applied.

Q. Prior to that, and while you were riding where you were, had you paid any attention at all to the whistles, and so forth, and bells of the train?

A. Not particularly, no.

Q. As you sit there now, do you have any recollection one way or the other in that respect?

A. Well, I haven't, no. I didn't pay any attention to it. I didn't pay any particular attention.

Q. Now, then, when you were coming—withdraw that. When you felt the brake applied, can you state whether or not that was, in your experience, an emergency application or another kind of application? What was it?

A. No, that was an emergency application.

Q. What did you do after you felt the brakes go into emergency?

A. Well, I more or less hesitated and hung on to something to see what was going to happen. I didn't know if the train was going to part or just what would happen.

Q. The emergency brake, when they go on, it could be because the engineer applied them in emergency or because the train had broken in two?

A. That is right.

Q. Or had derailed or any one of a number of reasons? A. That is right.

Q. The air brakes are so set up they are automatically applied [474] if anything goes wrong?

(Testimony of John Henris.)

A. That is right.

Q. And when the brakes go on, I take it you, as a railroad man, you hang onto something to find out what is going to happen?

A. That is correct.

Q. Mr. Henris, after the train came to a stop at Anderson, what did you do?

A. Well, I walked up as near as I could to the head end and opened the vestibule door and got down on the ground and went up to the engine and asked the engineer what happened, and he told me we had struck a car at the crossing.

Q. Then what did you do?

A. Well, then, I looked around at the engine, then proceeded back, looking the train over, and went back to where the accident occurred.

Q. When you got up there, what did you do? When you got up to where the automobile was, what did you do?

A. Well, I looked around and saw the driver of the car. I felt his pulse to see if there was any life there or anything, then I went up and reported to the dispatcher, went up to the depot and called up the dispatcher and told him about it.

Q. And asked for an ambulance and the police?

A. Yes.

Q. While you were there at the scene of the accident, was there any other—when you arrived there, were there any other people [475] around?

A. Well, when I was there, there were three or four people there.

(Testimony of John Henris.)

Q. After you came back from the station—is that where you called the dispatcher?

A. That is right.

Q. That is the station shown on this map?

A. Yes.

Q. After you came back from the station after calling the dispatcher and telling him to secure an ambulance and the police, did you at that time make any observations as to who was present?

A. Well, I see a highway patrolman, and then the ambulance was there with an attendant and the driver, and there were quite a few people there.

Q. This was later? A. Yes, on my return.

Q. I am talking about before. When you returned, had the ambulance already then arrived, when you returned? A. Yes, it had.

Q. Where did your rear brakeman go, do you know of your own knowledge now?

A. Well, yes, he proceeded back flagging.

Q. What is his duty in that respect? What is the purpose of going back flagging? [476]

A. Well, so that any following trains won't hit our train. We have to be protected any time we are on the main line.

Q. Any time you are standing on the main line you have to be protected against any trains following? A. That is right.

Q. Approximately how far, if you can tell us, was the automobile from the Howard Street crossing?

(Testimony of John Henris.)

A. Well, this would just be an estimate. I haven't any way—I don't know exactly.

Q. Yes, I know you didn't measure it, but what is your best estimate as far as you can tell us?

A. Around 100 feet, I would say.

Mr. Phelps: I have no further questions of this witness. You may cross-examine.

Cross-Examination

By Mr. Murman:

Q. Mr. Henris, is that the way you pronounce your name? A. That is right.

Q. The automobile that you saw was to which side of the right of way, having in mind that the map we have here shows north to your right, south to your left, west to the top and east to the bottom.

A. Yes. Well, it was on that side next to the highway.

Q. Do you recall where it was in connection with this switch standard here? Can you see it from where you are? [477]

A. Yes. Here is the crossing.

Q. Come down to the map. Maybe it will be easier for you.

(The witness left the witness stand.)

Q. As I understand it, this is a map prepared by the Southern Pacific Company. This is the Howard Street crossing here and what they call the switch standard for the west siding, and apparently the

(Testimony of John Henris.)

accident happened at this crossing. About where did you find the automobile, would you say?

A. Well, I would think it would be about in here (indicating).

Q. Do you want to make a mark there? We will call that H-1. Was the body off—well, you didn't know Mr. Shanahan?

A. No, I didn't.

Q. You did see the body there?

A. Yes.

Q. Was that beyond the automobile or was it short of the automobile in relation to the crossing?

A. Well, it would be short of the automobile in relation to the crossing.

Q. Do you want to mark that where you remember seeing the body?

A. I would say about here (indicating).

Q. Is that about right?

A. I think so.

Q. We will call that H-2. Will you resume your seat now?

(Witness resumed the stand.)

Q. I show you plaintiff's exhibit 7. Do you recall whether or [478] not that photograph looks about the way the car was when you saw it? Of course it is in a different position there, but I am just directing your attention to the automobile itself.

A. Well, I think that is about the condition of it all right.

Q. Did you look at it closely at all or just observe it rather generally?

A. No, I didn't pay particular attention to the automobile.

(Testimony of John Henris.)

Q. Can you tell us anything about the window on the left side of the door there? Do you remember anything about the left door window?

A. No, sir, I do not, no.

Q. And you said you felt the pulse of the body, and you found no pulse, is that right?

A. That is right.

Q. It was the engineer that reported to you that the train had struck an automobile, is that correct?

A. That is correct.

Mr. Murman: No further questions.

Mr. Phelps: I have no other questions.

The Court: That is all.

Mr. Phelps: May this witness, then, be excused?

Mr. Murman: Yes.

The Court: Yes.

Mr. Phelps: You may be excused.

(Witness excused.) [479]

TED STEPHENS

called as a witness on behalf of the defendant,
sworn.

The Clerk: State your name to the Court and jury, please.

A. Ted Stephens.

Direct Examination

By Mr. Phelps:

Q. Mr. Stephens, where do you live?

A. Klamath Falls.

Q. And by whom are you employed?

(Testimony of Ted Stephens.)

A. Southern Pacific.

Q. In what capacity? A. Train service.

Q. And what do you mean by train service?

A. That is the transportation department, as a brakeman.

Q. Are you promoted to a conductor or not?

A. No.

Q. How long have you worked as a brakeman for the Southern Pacific?

A. Just a little over eight years.

Q. On what division? A. Shasta Division.

Q. Now, then, were you a member of the train crew which was involved in an accident at Anderson, California, on December 27, 1948?

A. I was. [480]

Q. In which an automobile was struck at the Howard Street crossing? A. That is right.

Q. What was the number of your train?

A. 13.

Q. Who was your conductor?

A. John Henris.

Q. And who was your head brakeman?

A. Caillouette.

Q. What was your position on the crew?

A. Flagman.

Q. Do you have another man?

A. Well, the rear brakeman.

Q. Rear brakeman? Do you remember the number of cars? If you remember, fine, and if you don't remember the number of cars in your train——

(Testimony of Ted Stephens.)

A. Well, I couldn't say that I remember the amount of cars that we had——

Q. All right.

A. ——except I have heard others say.

Q. Well, let's not get into hearsay. If you don't, that is all right. We will establish that another way. A. Yes, sir.

Q. Now, Mr. Stephens, on this train you had gone on duty where? At Klamath Falls? [481]

A. At Klamath Falls.

Q. You had ridden this train all the way through to the point of the accident at Anderson?

A. That is right.

Q. And intended to ride it on to where?

A. Gerber.

Q. That is where you terminated your run?

A. Yes, sir.

Q. Now, then, as you left Redding, was that the last stop before Anderson? A. It was.

Q. After that last stop before Anderson and as you left Redding, where were you riding as you were approaching the town of Anderson?

A. In the rear car, in the smoking room.

Q. All right. And what was it that, as far as you personally were concerned, that called your attention that anything unusual had happened at Anderson? A. The brakes were applied.

Q. And how were they applied?

A. Well, I can say as to my experience as they were applied in emergency application.

(Testimony of Ted Stephens.)

Q. In other words, they were all set at one time and as fast as they could be set?

A. Yes. That is according to my experience.

Q. Now, then, when you felt that application in emergency, what did you do?

A. I sat down on the seat in the smoking room.

Q. And held on?

A. Yes, and there was a passenger there and I told him to hold on.

Q. Now, then, Mr. Stephens, before that—we only want your personal recollection, no hearsay, not what anybody else has told you, but can you tell us whether or not you made any personal observation, whether you know of your own knowledge, whether you were paying any attention so you could say whether or not there were any whistles sounded that you heard?

A. I wasn't paying any attention and as far as, I didn't hear any whistles sounded as to where I was at.

Q. It is a common thing to you to hear them, and you get so you don't pay any attention, is that right, on your own train? A. Yes.

Q. Now, then, as the train went into emergency and after you sat down, what was the next thing that you did?

A. Well, when the train stopped I got up and got my flagging equipment and opened the trap doors and went back up the track.

Q. And your flagging equipment, what did that consist of?

(Testimony of Ted Stephens.)

A. That is a red light, fusees, torpedoes and a white light.

Q. What was your purpose in going back on that occasion?

A. To protect the rear end of this train. It was my duty. [483]

Q. Was that necessary in your duty whenever a train stops on the main line?

A. Yes. Otherwise then a station stop. We have station stops.

Q. This was not a regular station stop for you?

A. No, it wasn't a regular station stop.

Q. All right. As you walked back, did you come upon the, or see the wreckage of a car?

A. Yes.

Q. Did you see the man, the body of a man there? A. Yes.

Q. Was there someone around there?

A. Yes.

Q. What did you do there? After seeing the man and seeing the persons there, what did you do?

A. I went down towards this body that was there and I looked at it, and this fellow was standing over from it a little ways and I asked him if he was in the car.

Mr. Murman: Just a moment.

Mr. Phelps: Well, let's not get into hearsay.

A. O.K.

Q. (By Mr. Phelps): Mr. Murman can very properly object to it and you are not entitled to say what was said either by him or you.

(Testimony of Ted Stephens.)

A. All right.

Q. After conversation with him, where did you go then? [484]

A. I went on up the track and there was a fellow at the depot.

Q. All right, when you got there what did you do?

A. I told him to tell the dispatcher that we had hit an automobile, and also to call an ambulance and to notify the law.

Q. After you did that, what did you do?

A. I went on up the track from the depot to protect the rear end of my train, as I said, and up at the crossing over there—I guess it is the North Street crossing—there was an automobile started to cross there and I stopped him and told him to go down there to see if he could help out as we had hit an automobile.

Q. Did you stay up there until the train left?

A. Not in this spot. I went farther back.

Q. You went farther back than that?

A. Yes.

Q. How much farther than that?

A. Oh, I imagine around—around, well, I will say around 1000 feet farther back than that.

Q. When you took that position did you stay there until the train—until you were whistled in?

A. I stayed there until I got the signal to come in.

Q. What is that signal?

A. I got a signal with the lantern from the conductor or the brakeman.

(Testimony of Ted Stephens.)

Q. That is for you to come on in, is that correct?

A. Yes, that is right.

Q. That was when you left?

A. That is right.

Q. So that you didn't go over to the automobile and you have done just exactly what you have told us, you went farther back to protect your train?

A. That is right.

Mr. Phelps: I think that is all, but it is three o'clock if your Honor please.

The Court: All right.

Mr. Murman: I have just one question, then we can excuse the witness, if that is agreeable to the Court.

The Court: All right.

Cross-Examination

By Mr. Murman:

Q. You said you took a red light and a white light? A. Yes.

Q. Were they burning when you took them?

A. The red light is burning usually from sunset until sunup, and the red light was burning when I took it.

Q. The white light, was that an electric torch?

A. Yes.

Q. So that you didn't have that burning?

A. That wasn't burning at the time I picked it up, but I turned it on before I went up. [486]

Q. You had it on as you went back, did you?

(Testimony of Ted Stephens.)

A. Yes.

Mr. Murman: No further questions.

Mr. Phelps: I have no questions. This witness may be excused.

The Court: All right.

(Witness excused.)

The Court: We will take a recess now, ladies and gentlemen, for ten minutes. During the recess will you bear in mind the admonition I have heretofore given you.

(Thereupon, a short recess was taken.) [487]

NOEL CAILLOUETTE

called as a witness on behalf of the defendant, sworn.

The Clerk: Will you state your name to the Court and jury, please?

A. Noel Caillouette.

Direct Examination.

By Mr. Phelps:

Q. Mr. Caillouette, where do you live?

A. Beg your pardon?

Q. Where do you live?

A. Klamath Falls, Oregon.

Q. And by whom are you employed?

A. Southern Pacific Company.

Q. In what capacity?

A. Brakeman and conductor.

(Testimony of Noel Caillouette.)

Q. Now, then, how long have you been employed as a brakeman and conductor?

A. Since—approximately 14 years.

Q. When were you promoted to conductor?

A. 1945.

Q. 1945. May I ask you to explain how the seniority works so that the man is promoted as a conductor—will you tell us under what circumstances he might be working as a brakeman having anything to do with the job?

A. You hold a regular assignment as a brakeman. As they [488] become short of conductors, you are used in the seniority order as a conductor.

Q. So that in 1948 in December you didn't have enough seniority as a conductor to hold a full time conductor's job? A. That's right.

Q. So that you then work as a brakeman?

A. Yes.

Q. Now, then, on December 27, 1948, Mr. Caillouette, were you employed on a crew which was involved in an accident striking an automobile on the Howard Street crossing at Anderson in which Mr. Shanahan was killed? A. Yes, sir.

Q. And what member of that crew were you?

A. I was the head brakeman.

Q. Now, who was your conductor?

A. John Henris.

Q. And where had you boarded that train?

A. Klamath Falls.

Q. I take it that you trainmen ride that train from Klamath clear to Gerber, whereas your engine

(Testimony of Noel Caillouette.)

crew change, they ride from Klamath Falls to Dunsmuir and then a new engine crew takes over at Dunsmuir and rides to Gerber; is that right?

A. That is correct.

Q. Now, so that the train conductor and brakeman work twice as long as the engine crew? [489]

A. That's right.

Q. Get fresh engine crews?

A. That's right.

Q. Now, then, on this day, the morning of this accident, you were head brakeman and as such where were you riding after the train left Redding and as it was approaching Anderson?

A. The rear seat of the first coach on the left side.

Q. Now, then, Mr. Caillouette, your duties as head brakeman require you to do any particular act as your train was approaching the station at Anderson? A. Yes, sir.

Q. And what were you required to do that is different than the engine crew?

A. I am required to open the vestibule door and check the train order boards.

Q. And what is a train order board?

A. Well, a train order board has paddles on it, one for east bound trains and one for west bound trains, that is geographically north and south.

Q. Now, I will show you a photograph which has been marked Defendant's Exhibit L in evidence and ask you if you can identify the train order board at Anderson?

(Testimony of Noel Caillouette.)

A. This is it right here (indicating).

Q. It appears to be a semaphore signal. Is that operated manually or automatically? [490]

A. Yes, manually.

Q. And when it is in the position that it is in the photograph that I have just shown you——

The Court: Let the rest of the jury see it.

Q. (By Mr. Phelps): When it is in the position as indicated in this photograph, what does that indicate? A. Indicates orders for our train.

Q. So that if it is out it would indicate there were orders for your train?

A. And if we didn't get them, we are required to stop the train and get the orders.

Q. If you don't get the orders?

A. That's correct, if we don't get them.

Q. And if no orders were there for you, how would that signal be?

A. The paddle down this way in the direction we were going that day, it would be this paddle here (indicating), which is white from the opposite direction of what we are going and red on the other side as this one here indicates, this paddle, for our train that morning would be down.

Q. So the most westerly paddle was the one you were looking at? Do you remember whether or not you had any orders? A. Yes, sir.

Q. Now, in order to do that you say you have to open the vestibule window?

A. The door. [491]

Q. The door. And did you do that on this occasion? A. Yes, I did.

(Testimony of Noel Caillouette.)

Q. And do you remember whether or not that signal indicated whether or not there were any orders for your train?

A. It was a clear board.

Q. Now, what do you mean by "clear board"?

A. Clear board indicates no orders.

Q. So that you didn't have to stop, is that right?

A. That is correct.

Q. And didn't have to pick up any orders?

A. No, sir.

Q. Now, then, will you tell us approximately where you were, where your train was as you opened up the vestibule door to check the order board?

A. Oh, probably was in the neighborhood of a quarter of a mile from the station.

Q. And after opening up the door did you get your head outside the clearance of the train?

A. Yes, sir.

Q. And then you observed the board. Then what did you do?

A. Closed the door and go in and report to the conductor, if he is there, clear board.

Q. And about how far from the station were you, or how far from the order board were you when you closed the door?

A. Oh, I probably was right opposite the station when I closed [492] it, or a little bit to the north or east, as the railroad trains are operated.

Q. Well, north geographically?

A. Geographically north of the depot.

(Testimony of Noel Caillouette.)

Q. A little bit north of the depot?

A. Just a trifle.

Q. And as you closed the door, did you see the Mars light oscillate?

A. I saw it flash on the buildings about twice.

Q. Had you seen it before that oscillating?

A. No, I can't say that I did before that because I would have nothing for it to reflect on, from where I was standing.

Q. You didn't see it oscillate then before?

A. No.

Q. Now, then, did you hear the crossing whistle sounded at any time? A. Yes.

Q. And where were you when you heard the crossing signal?

A. Standing in the open door.

Q. In the vestibule?

A. In the vestibule door, yes.

Q. And was this before or after you opened the vestibule door?

A. Well, I had the door open somewhere north of the first crossing at Anderson and he was blowing the whistle then.

Q. And by the first crossing in Anderson do you mean—will [493] you step down here so we won't be mistaken here? I show you a map. Here is Howard Street, it is not marked as such, but it is Howard Street here, crossing diagonally from it is your station—— A. Yes.

Q. And incidentally, can you point out to us where that order board is?

(Testimony of Noel Caillouette.)

Q. And do you remember whether or not that signal indicated whether or not there were any orders for your train?

A. It was a clear board.

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A. Yes, sir.

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(Testimony of Noel Caillouette.)

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A. In the vestibule door, yes.

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Q. And incidentally, can you point out to us where that order board is?

(Testimony of Noel Caillouette.)

A. The order board would be right in here (indicating).

Q. All right. And here is Ferry Street (indicating)? A. Yes.

Q. And then there is North Street with a store?

A. Yes.

Q. And those crossings, and is there another crossing south? A. Yes.

Q. All right, and is there another crossing north of North Street?

A. Well, it is a long ways up there.

Q. All right. Now, referring to the crossing at North Street, is that the crossing you heard his whistle for? A. Yes.

Q. As you had the door open? A. Yes.

Q. And then you rode the train in the vestibule right up until the time you closed the door, did you continue to hear crossing whistles sounded? [494]

A. Yes, sir.

Q. Now, after you closed the door, what did you do?

A. I immediately went inside through the end door of the coach——

Q. All right. A. ——to my seat.

Q. All right. And as you were on your way to your seat did you notice anything unusual in the operation of the train? A. Yes.

Q. What was that?

A. The application of brakes.

Q. And what did you do when you felt that?

A. Well, I realized it was an emergency applica-

(Testimony of Noel Caillouette.)

tion and I immediately went for my seat to sit down because anything can happen under those circumstances.

Q. And after that what happened?

A. We stopped.

Q. The train came to a stop and what did you do when the train came to a stop?

A. I went to the head end of the coach as soon as we stopped, opened the vestibule door on the opposite side of the station, or in other words, the engineer's side, and walked up to see what was the matter.

Q. All right. Before going back again, at any time while you were looking at this order board and before you closed the [495] vestibule door, did you have occasion to look down on the Howard Street crossing, or did you pay any attention to it?

A. Frankly, I can't say that I paid any attention.

Q. You were not able to see any cars there, stopped or otherwise?

A. No, I couldn't.

Q. After the train came to a stop, how many cars, incidentally, were you behind the engine?

A. Well, we had two head end cars that morning and I was in the first coach, which would be the third car.

Q. Now, when you arrived at the head end of the engine, what did you do?

A. Well, I asked Jesse, the engineer, I said, "What happened, Jesse——"

(Testimony of Noel Caillouette.)

Q. Well now, let's not have conversations. What did you yourself do?

A. Well, by that time the engineer joined me on the ground. We walked up to the front of the engine and on the side of the pilot beam hanging on the end of the pilot beam was the door of a car.

Q. All right, what did you do with that?

A. Took it off.

Q. Now, did you make any observation as to whether or not the bell was ringing at that time?

A. The bell was still ringing after we had stopped. [496]

Q. Did you make any observation as to whether or not the headlights were on when you went around the front? A. Yes.

Q. And did you make any observation as to whether the Mars light was oscillating?

A. Yes.

Q. Was it or was it not?

A. It was oscillating.

Q. Did you make any observation as to whether the other headlight was on or off?

A. It was on.

Q. Now, then, after that, after you did what you just told us at the head end, did you leave then?

A. I went to the rear of the train and on down the track.

Q. And how far down the track did you walk?

A. Well, the engine was somewhere in the neighborhood of the 50-car board. That would be from the siding switch, that mark, and the engine

(Testimony of Noel Caillouette.)

was a little south of the 50-car board, so that would be how far back I walked.

Q. You walked that distance back?

A. Yes.

Q. And did you come upon anything at all?

A. Well, before we got to the crossing we could smell gasoline and then I saw a car off to the side.

Q. And what did you do when you got there?

A. Well, went to the car, looked at it, just glanced at it, and saw a man laying there on the ground.

Q. Did you go over to him? A. Yes.

Q. And what did you do?

A. Well, there was one or two of the other fellows standing there and I asked who he was——

Q. You can't tell us as to any conversation, Mr. Caillouette.

A. Well, there was some papers laying on his hip, his left hip, and I looked at them and the top one was the gas credit card with a name on it.

Q. What was that name?

A. Ellis, I think it was Ellis P., I am not sure, but Shanahan was the last name.

Q. Did you stay around there, or did you go some place?

A. The conductor instructed me to stay there until he came back.

Q. And you stayed right there? A. Yes.

Q. Were you still there when the highway patrol officer came? A. Yes.

Q. And do you know him? A. Yes.

Q. And did you recognize him?

(Testimony of Noel Caillouette.)

A. Oh, yes.

Q. And what is his name? [498]

A. Floyd Sublett.

Q. Did you see him around here when he came down to testify? A. Yes.

Q. You recognized him as the officer you saw?

A. Yes, definitely.

Q. Now, then, can you tell us whether or not you made any examination of the automobile with Mr. Sublett? A. Yes.

Q. And when you did that did you make any observations, if you can tell us, did you make any observations as to the lefthand window on the car as to whether it was up or whether it was down?

A. On the lefthand side?

Q. On the lefthand side.

A. The driver's side, the window was up.

Q. All right. [499]

Q. On the opposite side, that was the door that you had taken off of the pilot? A. Yes, sir.

Mr. Phelps: You may cross-examine.

Cross-Examination

By Mr. Murman:

Q. Mr. Caillouette, when you looked out for the order board, what was the condition of visibility?

A. Well, it was about twilight, breaking day.

Q. Breaking day?

A. Yes, what you would ordinarily term as twilight.

Q. You could see the order board?

(Testimony of Noel Caillouette.)

A. Yes. Could also see the light.

Q. In addition to the board being a paddle, as you call it, it also had a lighting signal?

A. That is correct.

Q. Now, what did it show, a white light?

A. Green.

Q. Green light. Red light would have been a stop light? A. That is correct.

Q. It was a green light?

A. That is correct.

Q. How about the weather? Did you notice the condition of the weather?

A. Oh, it was kind of misty.

Q. Could you see the mist? [500]

A. Well, I would say yes.

Q. Do you know anything about the speed of the train as you looked out for the order board?

A. Well, I personally happened to check him before we got to Anderson.

Q. When you say checked him, you mean checked the engineer?

A. Checked the speed of the train.

Q. What did you find the speed to be?

A. About 69 miles an hour.

Q. That was north of Anderson?

A. Just north of Anderson.

Q. And there is a slight downgrade into Anderson, is there?

A. We were on that at the time when I checked it. That was on the last mile out of Anderson.

Q. Of course, you didn't see the accident hap-

(Testimony of Noel Caillouette.)

pen? You had already closed the vestibule door, hadn't you? A. That is correct.

Q. You were looking out the left side of the train as you looked for the order board?

A. That is correct.

Q. You didn't look out the right side at any time? A. No.

Q. Now, when you checked the wreck of the car with Mr. Sublett, did you look at that left door at all or just glance at it?

A. I personally opened the door. [501]

Q. It was still able to swing on its hinges?

A. Mr. Sublett and I both opened the door.

Q. How was the car lying?

A. It was lying straight up.

Q. You went around it to the left side and opened the door? A. Yes, sir.

Q. Did you try it to see whether the windows would run up or down? A. No, sir.

Q. When you say it was up, you mean it was all the way up? A. Yes, sir.

Q. Up to the top? A. Yes, sir.

Q. Did the door have any dents in it or damage of any kind that you noticed?

A. Well, frankly, I couldn't tell you definitely on the door.

Q. Did you have some lights with you at the time?

A. Oh, I might have had my lantern in my hand but I don't believe I had it lit because it wasn't necessary.

(Testimony of Noel Caillouette.)

Q. You could see without the lantern?

A. Yes.

Q. It still wasn't daylight, though, was it?

A. It was, as I stated before, sort of twilight.

Q. Kind of a daybreaking light, is that it?

A. Break of day had already shown on the hill, horizon. [502]

Q. What kind of day was it? Was it cloudy or a clear day?

A. I already stated it was misty.

Q. Misty? A. That is correct.

Q. But you could see the daylight breaking?

A. Oh, yes.

Q. You didn't check that left door carefully, did you? Just looked at it, saw the window was up and opened the door, is that right?

A. I personally opened the door. I opened the door for Mr. Sublett to look in and ascertain whose car it was on the register slip.

Q. Did you check the light switch for the headlights on the instrument panel of the car?

A. No, sir.

Q. Did you notice as to whether there were any lights burning? A. No, sir.

Q. You don't recall seeing a tail light burning?

A. No, sir.

Mr. Murman: I have no further questions.

Mr. Phelps: I have no questions, your Honor.
May this witness then be excused, also?

Mr. Murman: Yes.

The Court: Yes.

Mr. Phelps: Thank you. You may be excused.

LELA JOHNSON

called on behalf of the defendant; sworn.

The Clerk: Will you please state your name to the Court and jury?

A. My name is Lela Johnson.

Direct Examination

By Mr. Phelps:

Q. Mrs. Johnson—is it Miss or Mrs.?

A. Mrs. I am married.

Q. Mrs. Johnson, where do you live?

A. Anderson, California.

Q. How long have you lived in Anderson, California? A. About eight years now.

Q. By whom are you employed?

A. Rafael Sneff Lumber Company.

Q. What do you do there?

A. I cook for the office men and then I do the janitor work.

Q. Mrs. Johnson, have you lived in the same place in Anderson now and in December, 1948?

A. Yes, sir, same place.

Q. So that on the morning of December 27, 1948, you lived in Anderson, is that right?

A. Yes, sir.

Q. Will you tell us whereabout you live?

A. I live on Douglas Street in Anderson.

Q. Now, Mrs. Johnson, I am going to show you a photograph [504] which has been introduced in evidence, Defendant's Exhibit L, and ask you if you

(Testimony of Lela Johnson.)

can show us in that photograph where your house is. See if you can point it out.

A. Would you mind if I got my glasses?

Q. Surely.

A. I read a great deal, so I have got to use my glasses.

Q. Do you use glasses for reading?

A. Just reading, that is all.

Q. Do you use glasses for distance?

A. No, sir.

Q. All right.

A. Now. This is my house sitting right back in here.

Q. Where I am pointing, Mrs. Johnson?

The Court: Let the jurors see it.

Mr. Phelps: Yes, I was going to mark it, if I could, here.

Q. You are pointing to a house right there, is that it?

A. Yes, sir, right there, that is it.

Q. Let me mark it on that photograph with an arrow down to your house. Is that arrow now pointing down to your house?

A. Yes, sir, right down to my house.

Q. All right. Now, I will put a designation on that, "J-1," on the photograph, with a line and arrow drawn down to your house.

A. Yes, sir, this line comes right down to my house.

Q. All right, Mrs. Johnson, is that the house you

(Testimony of Lela Johnson.)

lived in on [505] the morning of December 27, 1948?

A. Yes, sir.

Q. Now, will you tell us from the front yard of that house whether you have a view of the Howard Street crossing?

A. Well, it is just about a block, I guess, from my house to—you mean to the Howard Street crossing?

Q. Yes.

A. Yes, sir. Why, just about a block.

Q. All right, Mrs. Johnson. Do you remember an incident where an automobile was struck which was driven by Mr. Ellis Shanahan?

A. Yes, sir.

Q. And in which he was killed at the crossing, the Howard Street crossing in the town of Anderson?

A. Yes, sir.

Q. You do remember that?

A. Yes, sir, I do.

Q. Did you see that accident?

A. Yes, sir, I did.

Q. Now, Mrs. Johnson, where were you at the time that you saw that accident?

A. I was standing outside of my gate. I had came out of my house that morning to get some wood to build me a fire and I heard the train coming and so I did stop and look as usually I do, and I was outside the gate in my wood yard at the time [506] the accident happened.

Q. You like to watch the trains go by?

(Testimony of Lela Johnson.)

A. Yes, sir, especially when she going south.

Q. Now, then, on this occasion you did stop and watch the train go by?

A. Yes, sir, I sure did.

Q. Now, what was that that attracted your attention to the train? Did you hear any whistles before that?

A. Well, as I was coming out my yard, I heard a train come away up the track, and the whistle and horn was going and she was blowing and blowing there at the crossing, you know, so when she gets down to Anderson near the station, you see, she blew a long whistle and horn. Yes, sir, she blowed and that make me look more so, then I kept my eyes right on her, and when I throwed my eyes to the crossing I saw this car come up and just as the car drove up on the track the train knocked it off.

Q. Now, then, before that, before the impact, did you have any occasion as you were looking in that direction to observe the wigwag signal on Howard Street?

A. No, I hadn't paid no attention before this accident.

Q. That is before the accident?

A. Yes, sir.

Q. I am asking you if at any time that you were standing there in your front yard that morning and as the train was coming up [507] to the crossing and as the car approached the crossing, did you see a wigwag?

(Testimony of Lela Johnson.)

A. I saw it then when I looked at the crossing.

Q. When you looked at the crossing, can you tell us whether or not the wigwag was in operation?

A. It was working and the bell was ringing.

Q. Did you hear the bell ringing?

A. Yes, sir, I heard the bell ringing.

Q. Did you see a light on the wigwag?

A. Yes, sir, I did.

Q. Did you see it wag back and forth?

A. Yes, I sure did.

Q. And before that, Mrs. Johnson, had you seen the lights, headlights on the locomotive approaching the crossing?

A. You mean the passenger train?

Q. Yes.

A. Yes, sir. She had her lights on.

Q. She did? A. Yes, sir.

Q. As it approached the crossing, did you have occasion to observe the beam of the headlight lighting up objects at the crossing?

A. Yes, sir.

Q. And it did do that?

A. It did do that. [508]

Q. Did it light up the car just before the impact? A. Yes, sir, it did.

Q. Now, then, did you see the headlights of any train—well, where you were when you saw the train, did it come out from behind any object? Where was the train itself when you saw it?

A. I saw the train as it passed the little bus sta-

(Testimony of Lela Johnson.)

tion there, and Mrs. Helen's cafe. I could catch the lights as it passed the cafe, and then when it passed the bus station, then I had a good view of it.

Q. As you first looked at it through that place, you could see it through.

A. Yes, see it perfectly good.

Q. Through the standing boxcar train, is that it?

A. Yes, sir.

Q. There on the siding? Now, then, after that, after it came out from behind the standing train, Mrs. Johnson, did you have a clear view of the train?

A. I had a clear view just like I am looking at you.

Q. You could see it as it continued on?

A. Yes, sir.

Q. And you turned your glass toward the crossing?

A. Yes, sir.

Q. That is when you saw the automobile at that time?

A. Yes, I saw the car.

Q. And at the same time you saw the wig-wag in operation?

A. Yes, sir, it was. [509]

Q. And had you heard the bell on the wig-wag before that?

A. Yes, sir, I had.

Q. Had you heard the bell on the wig-wag before you heard the whistle for the train or after?

A. Well, I heard the train coming down the track, then I paid attention to the bell. The wig-wag was running before the train got there and the bell was ringing.

(Testimony of Lela Johnson.)

Q. You heard the train when it was way down the track?

A. Yes, a good ways up the track.

Q. You heard the sound of the whistle for the Ferry Street crossing in Anderson?

A. Yes, for the Ferry Street crossing, before you got down to the Howard Street crossing.

Q. Did you go to the scene of the accident, or what did you do?

A. After I seen this accident, I run out across the vacant lot and I seen what had happened. I wasn't dressed and I run back to the house and got dressed and made my fire and then I went over to the accident and looked on.

Q. How long did you stay there at the scene of the accident after you were dressed?

A. About five minutes. I didn't have much time.

Q. So that after five minutes you left?

A. Yes, sir.

Q. Why did you leave? [510]

A. I had to go to work.

Q. Before the time you left, had the highway patrol officer come or not?

A. No, sir, he wasn't there when I left.

Q. There were other people around?

A. Yes, sir, there was a few people had gathered.

Q. Can you tell us what the condition was with respect to darkness or lightness? What was it?

A. Well, it was kind of, I would say, betwixt and between. It wasn't good light and it wasn't dark, wasn't good light and wasn't good dark.

(Testimony of Lela Johnson.)

Q. Practically dark except where the headlights lit it up? A. Yes.

Q. Betwixt and between, you mean with reference to dawn?

A. Yes, sir, that is what I have reference to, just about dawn.

Mr. Phelps: That is all, you may cross-examine.

Cross-Examination

By Mr. Murman:

Q. Mrs. Johnson—is it Mrs. Johnson?

A. Yes, sir; I am married. I have a family.

Q. Is your husband alive? A. Yes, sir.

Q. What is his business?

A. He and I am working at the same place.

Q. What does he do?

A. He cleans up in the bank at the Rafael Smith office. [511]

Q. How long have you and he been doing that work?

A. He been doing it four years. I started this year in February.

Q. At the time this accident happened you said you had to hurry off to work. What were you doing then?

A. I was working for Mrs. McCormack at that time, housekeeping.

Q. That is in Anderson? A. Yes, sir.

Q. Was your husband working at that time too?

A. Yes, sir, he was working in the office at that time.

(Testimony of Lela Johnson.)

Q. Does he receive a pension from anybody?

A. No, sir, not now.

Q. In 1948 was he receiving any disability pension? A. Yes.

Mr. Phelps: I object to that. I don't see the materiality.

The Court: I don't see the materiality.

Mr. Murman: I want to show an interest.

Q. (By Mr. Murman): Was the Southern Pacific Company paying him some benefits?

A. Yes, sir.

Mr. Phelps: I didn't even know it before. Of course I wouldn't have objected if there was any materiality at all. Never heard of it.

Q. (By Mr. Murman): You also had worked for the Southern Pacific Company, hadn't [512] you? A. I had a few months.

Q. Now, on this particular morning, as you stated, you were over at your home, is that correct?

A. Yes, sir.

Q. And your home is this cottage right over here where the J-1 arrow was?

A. Yes, sir, that is my cottage.

Q. That is on Douglas Street, isn't it?

A. Yes, sir.

Q. Douglas Street is the street behind Center Street, what is known as highway 99?

A. Yes, sir.

Q. It is one block further west? A. Yes.

Q. You understand what I mean? If you don't understand me, understand my questions, say so, because we want to understand each other.

(Testimony of Lela Johnson.)

A. That is right.

Q. That is beyond what this map shows, isn't that correct? A. Yes, sir.

Mr. Murman: Do you want to look at this (handing document to counsel)?

Mr. Phelps: Please. Thank you.

Q. (By Mr. Murman): Now, Mrs. Johnson, I show you what purports to be a photostat of a portion of the official map of [513] the town of Anderson, which shows the railroad tracks running across, as you see them, and you see these lines that show alternately dark and light? A. Yes, sir.

Q. Also West Center Street, you see that?

A. Yes.

Q. Then it shows Douglas Street, you see that there? A. Yes, I do.

Q. Here is Howard Street running this way and the crossing off a little bit to the side. Can you point to me on this map where your cottage was located on Douglas Street with reference to Howard Street?

Mr. Phelps: May it please the court, so that it may be clear—no objection to the use of that to refresh her recollection or point out something, but my objection would be that it is an unauthenticated photograph and without foundation, that particular document, at this time.

Mr. Murman: I think we will establish it later.

The Court: With that understanding, that you will establish that it is a real, true delineation of that, I will allow it.

(Testimony of Lela Johnson.)

Mr. Murman: Yes, I understood that I can do that, your Honor.

The Court: All right.

Q. (By Mr. Murman): Do you understand my question, Mrs. Johnson? [514]

A. Well, I don't know whether I hardly do or not.

Q. I was asking you to point out if you could on this portion of the map of Anderson where your cottage was located over here on Douglas Street, this being Howard Street along this way and Douglas Street running at right angles. Can you point that out for me?

A. Well, this is Howard Street?

Q. That is right.

A. And this is Ferry Street?

Q. That is right. A. And this is the track.

Q. That is right.

A. Then this is the depot?

Q. Here is the depot, right here (indicating).

A. My house ought to be right back in here somewhere, about here.

Q. 5? Did you say 5th? A. Yes.

Q. Here is the number—1, 2, 3, 4, 5, 6. Would it be here where it says 5?

A. It should be. I can't hardly understand that map, but it certainly seems to me like, because if this is Howard Street coming on up here——

Q. That is correct. [515]

A. It is just a block from my house to Howard. Here comes Ferry Street and this is the track?

(Testimony of Lela Johnson.)

Q. That is right. I understood you to to say you live on Douglas Street?

A. Right here (indicating).

Q. Near Howard Street?

A. Here is Douglas, this is Douglas. Yes, my house ought to be right here.

Q. Will you make a mark here?

A. It should be. I am not sure, now.

Mr. Phelps: Then I suggest it would be indefinite and uncertain. The witness is not educated and skilled in the ways of legal maps like that, and I don't think she should be asked to identify it.

The Court: Unless she is sure. Show a woman like that a map and she is not sure, doesn't understand the map, and I don't think she ought to——

Mr. Phelps: My objection is on that ground, because it has been identified on the photograph.

Mr. Murman: Of course the photograph was at an angle and this is a flat diagram of it.

Q. (By Mr. Murman: If you understand it, say so; if you don't understand it, I don't want you to mark it.

A. Well, I hardly understand this map.

Q. Then we won't use it if you don't understand it. [516]

A. I don't like to because I don't hardly understand it.

Q. All right, we won't have you mark it, then.

The Court: It is now four o'clock

Mr. Phelps: May it please the court, before the court adjourns, I wonder what your Honor's wishes are with respect to Friday of this week? I had in

(Testimony of Lela Johnson.)

mind last week we adjourned over Friday. I know the same problem exists at New Year's that existed at Christmas. I know it does for me and I think probably for the members of the jury.

The Court: I was going to be facetious, but I won't say anything.

Mr. Phelps: I had in mind, if your Honor please, if we were going tomorrow and adjourn Friday, if necessary.

The Court: Won't we be through with this case tomorrow?

Mr. Phelps: I think we will be through with the taking of testimony, certainly, tomorrow.

Mr. Murman: I will have two rebuttal witnesses that I know of.

The Court: How many more witnesses have you?

Mr. Phelps: If your Honor please, I am in a difficult position in this respect, that I had subpoena issued for one witness who has advised us that he is not able to respond to a subpoena because he is ill, and I am still endeavoring to get him down here. I don't know whether I will be able to do it or not. If I can't, of course I am in the position of [517] having to go forward without him unless it becomes necessary to ask the court for a continuance to take his deposition.

The Court: Would you ladies and gentlemen prefer to adjourn tomorrow until next week?

The Jury: No.

The Court: You would rather go forward and dispose of it?

(Testimony of Lela Johnson.)

A Juror: Get rid of it.

Mr. Phelps: That is fine with me.

Mr. Murman: That is agreeable. We will be ready to go forward with rebuttal tomorrow.

The Court: Will you be able to start your arguments tomorrow?

Mr. Murman: I think so. I don't see any reason why we can't.

The Court: I would like to have you all argue on one day, if you can.

Mr. Phelps: I would think so. In fact, that is very important.

The Court: Then I will instruct the jury at 9:30 Friday morning.

Mr. Murman: Yes, your Honor. I think that is about it.

The Court: Then we will adjourn until tomorrow morning at 10 o'clock, and bear in mind the admonition heretofore given you.

(Thereupon an adjournment was taken to Thursday, December 29, 1949, at 10:00 a.m.)

* * *

December 29, 1949, 10:00 o'Clock

The Clerk: Shanahan v. the Southern Pacific, for trial.

Mr. Phelps: Ready, Your Honor.

Mr. Murman: Ready. Mrs. Johnson, I believe, was on the witness stand, Your Honor.

The Court: Yes, take the stand.

(Testimony of Lela Johnson.)

LELA JOHNSON

resumed the stand on behalf of the defendant.

Cross-Examination

(Continued)

By Mr. Murman:

Q. Mrs. Johnson, on the morning of December 27, 1948, you were in your home, I think you said?

A. Yes, sir.

Q. That is over on Douglas Street?

A. Yes, sir.

Q. And about what time had you gotten up that morning, do you remember?

A. Well, it was around about a quarter to six that morning.

Q. A quarter of six. It was dark at the time, was it? A. Yes.

Q. What did you do after you got up? Did you go outside at all or did you stay in the house?

A. After I gotten up, I started me a little fire, and then I had to have some more kindling and I went outside to get me [519] some wood and kindling.

Q. Where do you keep your wood and kindling?

A. Outside at my gate.

Q. The front gate? A. Yes, sir.

Q. That would be on Douglas Street?

A. Yes, sir.

Q. That was after you had had a fire made inside, is that it? A. Yes, sir.

(Testimony of Lela Johnson.)

Q. Did you go out alone or did you go with somebody else? A. I was alone.

Q. Alone. When did you hear the train?

A. Well, after I started out I heard the train coming.

Q. What did you hear about the train?

A. I just heard the rumbling of the train and I heard the whistle way up the track, seemed to me like it might be about a mile up the track.

Q. Was it a whistle you heard, a steam whistle?

A. I heard a horn and the whistle.

Q. You heard a horn and whistle?

A. Yes, sir.

Q. When you say horn, what do you mean by that?

A. Well, the steam whistle it blows and the horn goes something like this: Ahhhh-ahhhh-ahhhh.

Q. You mean the horn on the train? [520]

A. Yes, sir. I called it a horn. I don't know.

Q. There is a difference in sound between what you call a horn and what you call a whistle?

A. Yes, sir.

Q. And you said you heard both the whistle and the horn? A. Yes, sir.

Q. You went out to the kindling pile, did you?

A. Yes, sir, I went outside of my gate. My wood yard is outside of my gate. I went outside of my gate to get me some wood and kindling to finish my fire, and after the train was approaching, I stayed and watched to look to see it go by as I usually do.

Q. I understand that you looked towards the

(Testimony of Lela Johnson.)

east, didn't you? That is, it would be toward the train tracks? A. Yes, sir.

Q. From Douglas Street?

A. From Douglas Street.

Q. There were some buildings in front of you, weren't there? A. Yes, sir, there was.

Q. In other words, your view of the train is not a clear view all the way, is it?

A. No sir, it isn't, not all the way.

Q. When you looked over there, was it still dark?

A. It was kind of dark.

Q. How about the weather? Did you notice what kind of weather [521] it was that morning?

A. It was cloudy, but high cloudy. It wasn't low clouds. The cloudiness was high and the weather, it wasn't foggy, either.

Q. Would you say it was not misty?

A. Well, I didn't pay that attention. Might have been a little misty. I didn't pay any mind.

Q. You didn't see any mist?

A. No, I didn't see any, but I know there was high cloudiness.

Q. As you looked over the railroad tracks, did you see a train on the track there, standing on the track?

A. No, sir, I didn't see any train standing over there.

Q. You didn't see a freight train?

A. No, I didn't pay any attention.

Q. Could you see the lights at the depot?

A. Yes, sir, I could.

(Testimony of Lela Johnson.)

Q. You didn't see the caboose silhouetted against those lights?

A. No, sir, I didn't see it.

Q. Where did you first see the light on the engine you mentioned on the train that you heard?

A. Well, when that train, when this passenger train was approaching the depot, I could look and see the light down the—flashing down the track, then as she passed by Miss Helen's Cafe I could catch a glimpse of the train, and then it passed the bus station right before my door, and I was standing right before [522] my door in my wood yard, and as she passed, of course she had the horn and whistle on, and as she passed, of course she throwed her light as she come, you know, and I kept looking and just——

Q. Well, let we ask you this first before we get that far. A. Yes.

Q. As you saw the light on the engine for the first time, couldn't you see the freight train silhouetted against the engine light?

A. No, I didn't pay any attention. I didn't see no freight train. I didn't even know there was one over there.

Q. Do you remember seeing a line of sort of black objects up until the depot came into position?

A. I didn't see any that night. I might have seen it, but I don't remember.

Q. You don't remember seeing it?

A. No, sir.

(Testimony of Lela Johnson.)

Q. You have told us about the various places that the buildings got in your way. Did you mention Helen's Cafe? Is that one building?

A. Yes, sir, that is one of the buildings. [523]

Q. I am showing you now this panorama view of defendant's exhibit L. A. Yes, sir.

Q. You mentioned that building, Helen's Cafe?

A. That is it.

Q. And you said something about the Greyhound bus station. Where is that?

A. It is right in here (indicating). Before my door. This is Miss Helen's cafe, then right on down is the little old bus station.

Q. Is that further to the north than Helen's Cafe?

A. No, sir, Miss Helen's Cafe is further to the north. What is these signs in here?

Q. I don't know. They are in the picture. They are apparently on the corner of Center Street and Howard Street there.

A. It shows Miss Helen's Cafe. The bus station should be right in here.

Q. But you did see the form of the bus station and the form of the cafe, is that right?

A. Yes, sir.

Q. The train came along? A. Yes.

Q. You were watching the train, were you?

A. Yes, sir, I was.

Q. How about this building on the corner here where that Coca-Cola [524] sign is at that corner?

(Testimony of Lela Johnson.)

As the train went along could you see it come by the sign here?

A. That is that—this is Helen's Cafe——

Q. How about this building right here where the Cola sign and Miss Helen's Cafe, and I could catch on?

A. Yes.

Q. Did that get in your way at all?

A. Yes. A little up it passed between that Coca-Cola sign and Miss Helen's Cafe, and could catch glimpses of the train as she went by.

Q. You caught glimpses of the headlights as it came between the buildings?

A. That is right.

Q. You were watching the headlights all the time?

A. Yes, I kept my eyes right on it.

Q. Right on the headlights? Was it going pretty fast?

A. Pretty fast, to me.

Q. How about the trees way up here? Did you see those trees as the headlights were going along? There seem to be a number of trees in the background here.

A. Yes, sir, sure I could see the trees in over there.

Q. At that time, of course, there were no leaves on the trees?

A. No.

Q. Except on the evergreens, apparently. As the train came out behind this last building on the corner, you then could [525] see it up Howard Street, is that right?

A. Yes, sir, a clear view.

Q. Were you still watching the headlights?

A. Yes, I was still watching the headlights.

(Testimony of Lela Johnson.)

Q. You kept looking at the headlights as it went down the track?

A. Yes, sir, I kept my eyes right on the train.

Q. Right on the train. A. Yes.

Q. I notice there appears to be a palm tree right over here. Is that a palm tree, Mrs. Johnson?

A. Yes, sir. That is set in a vacant lot.

Q. Was that between you and the railroad track?

A. No, sir, it is just opposite me.

Q. It is opposite you?

A. Yes, sir, right across the fence from me over there.

Q. That palm tree, then, is on Douglas Street?

A. Yes, sir, it is on Douglas Street, on the same side I am on.

Q. How about this tree right up here near to this, looks like a box. Is that up on the right of way?

A. Yes.

Q. I am pointing to this tree. That is up near to the box? A. Yes.

Q. Then this telegraph pole and this other telegraph pole. As the train came to the crossing you were still watching the lights of the train, I [526] presumed?

A. Yes, I was watching the whole train.

Q. Yes. You were watching the whole train? I think you said you always watched the trains going south?

A. I do because I think about my mother down there.

(Testimony of Lela Johnson.)

Q. When it got to the crossing what did you see?

A. I saw a car coming up on the crossing.

Q. You saw the car? A. Yes, sir.

Q. You are sure you saw the car?

A. Yes, sir, I saw the car before the train hit it.

Q. It was still dark, was it not?

A. It was still dark, yes, but the car lights were burning and the train lights.

Q. The car lights were burning?

A. Yes, and the headlights of the train was on. They throwed plenty of light so I could see. Anybody could.

Q. So you actually saw the car?

A. Yes, sir, I saw the car.

Q. It was a pretty short interval, wasn't it?

A. Yes, it was just a minute I saw it up until the train hit it.

Q. Much less than a minute, wasn't it?

A. Oh, yes, sir.

Q. You mean much shorter than that?

A. Yes, sir. [527]

Q. You saw the train hit the car and there was a big flash? A. Yes, just a blaze.

Q. As you were watching the train going down the track and the headlights, what is the next thing you saw? The headlights of the automobile?

A. Before the train hit it?

Q. Yes. A. Yes, sir.

Q. You were watching the train going down there? A. Yes, sir.

(Testimony of Lela Johnson.)

Q. And the next thing you saw, was that the headlights of the automobile?

A. Yes, I just throwed my eyes to the car as this car come up on the crossing, and the lights were burning on the car.

Q. Then what did you see after that?

A. The train struck it.

Q. Did you see the train strike it?

A. Nothing but that flash.

Q. A big flash? Did you hear the noise when the train hit it?

A. Yes, sir, I could hear it.

Q. Then the train went on past the crossing?

A. Yes.

Q. I think you said you went in and got dressed and came——

A. No, I didn't at that time. I run on across the way.

Q. You went all the way up Douglas Street?

A. Over to the crossing [528] with my housecoat on, then I looked and seen what had happened, then I rushed away before somebody gets there and I went back to the house and got dressed and finished making my fire. I had never went back to finish my fire. I finished my fire and got dressed and went up over there and at that time there was a young man and lady had drove up, and I was talking to them and the brakeman and the conductor had got off and come back.

Q. Do you remember a gentleman by the name of Mr. Wickfield talking to you about the accident on December 31 at your home?

(Testimony of Lela Johnson.)

A. Yes, sir, I remember him.

Q. That is the gentleman here in the court room?

A. Yes, sir, I remember him.

Q. Do you remember telling him at that time you didn't hear any train whistle blow?

Mr. Phelps: If your Honor please, if this is a written statement I suggest the witness is entitled to see it and so am I.

Mr. Murman: I am asking if she didn't make an oral statement.

Mr. Phelps: I would like to inquire whether you do have that? If that is what you want to do, I think you should proceed in that way. That is the orderly way.

Mr. Murman: It is an oral statement I am inquiring about now. [529]

The Court: I will overrule the objection. Do you understand the question or would you like to have it repeated to you?

A. Well, I wouldn't mind. You can repeat that question again, if you will.

Q. (By Mr. Murman): I will be glad to. Do you remember talking to Mr. Wickfield? He was asking you about what you saw and heard that morning.

A. Yes, sir, I remember him talking to me.

Q. Do you remember telling him you didn't hear the whistle blow?

A. I remember telling him I heard a horn and whistle blow.

(Testimony of Lela Johnson.)

Q. You said the horn and whistle? A. Yes.

Q. You don't remember telling him you didn't hear a horn or whistle blow?

A. No, sir, I don't remember telling him.

Q. And do you remember telling him at that time that when you saw the automobile there was no headlight on the car?

A. No, sir, I don't remember telling him that, either.

Q. Do you remember after he talked with you that he asked you to sign something? That is, after you talked with him.

A. Yes, sir, he asked me to sign a paper, I believe, or something.

Q. Did you read the paper over before you signed it?

A. No, sir, he read it for me. [530]

Q. He read it for you? A. Yes, sir.

Q. You didn't have your glasses with you at that time?

A. No, sir, I didn't have them and he read it.

Q. That was at your home?

A. At my home.

Q. You only know what he said to you about the paper and then you signed, is that right?

A. Yes, sir.

Q. That is your recollection now?

A. Yes, sir.

Q. You say you didn't read the paper over?

A. No, sir, I didn't read the paper. He read it for me.

(Testimony of Lela Johnson.)

Q. He read it for you? Are you sure about that?

A. Yes, sir.

Mr. Murman: No further questions.

Mr. Phelps: I have no questions, your Honor.

May this witness be excused.

Mr. Murman: Yes, she may be excused.

The Court: All right, you may step down.

(Witness excused.)

Mr. Phelps: Before we proceed further, if your Honor please, may I take up a matter with the court and counsel in the absence of the jury?

The Court: Will it take very long? [531]

Mr. Phelps: It will take only a few minutes. In fact, if we can step into chambers it probably wouldn't take thirty seconds.

The Court: All right, remain in the box, ladies and gentlemen, and we will go out this time.

(The following proceedings were had in court chambers in the absence of the jury.) [531-A]

(The following proceedings were had in the Judge's chambers outside of the hearing of the jury:)

The Court: At the request of Mr. Phelps, counsel for plaintiff and defendant retired to chambers with the Judge, and the following ensues:

Mr. Phelps: I didn't want to take up in the

presence of the jury without first advising Mr. Murman. I want to ask Mr. Murman whether or not it will be necessary, whether he wants me to call as a witness to prove that this Mr. Johnson, the rear brakeman of the train that was on the siding, is no longer in service. I attempted to find him. They checked all of his own addresses; we have been unsuccessful in that. I had this in mind, and I didn't want it to come up before the jury,——

Mr. Murman: I will make no point of it.

Mr. Phelps: I want to get that before the jury as a stipulation, and the point is this, they be fully advised,——

Mr. Murman: Yes.

Mr. Phelps: He left the service on December 31, 1948. Mr. Turner, who is sitting beside me, a member of the claims department of the Southern Pacific, at my request has made repeated efforts to try to locate him and has been unsuccessful and he can be called to testify to those facts, which I had in mind. It just occurred to me he has been sitting throughout the proceedings, and the other witnesses have been excluded.

Mr. Murman: I make no issue on that. Your own conductor [532] said he didn't see him after that particular occasion.

Mr. Phelps: Can I make that statement?

Mr. Murman: Yes, you can make that statement that you haven't been able to locate him. If that is the fact and if you say those are the facts, then those are the facts.

The Court: How do you stand now?

Mr. Phelps: I stand in this way: I am now ready to rest, and this is the other thing I want to take up. Now, I have tried, and have a subpoena out for another witness, a witness who has said that he is unable to come. He is an independent witness. All he would testify to is that he heard the whistle, nothing more, and that it whistled repeatedly as the train came into town. Now, I am in the position I don't want to ask for any continuance to take a deposition. I wondered what your thinking was along the line, if he is called, that you would stipulate that he would testify that he did hear the whistle on repeated occasions as the train——

Mr. Murman: Well, I can't stipulate.

Mr. Phelps: If you won't stipulate to that,——

Mr. Murman: My witnesses have told me and my understanding of the case is that the train whistle did not blow until it got to the Howard Street crossing. I will do this: I am perfectly willing, if you can get your witness at any time before the arguments, that you may put him on if he comes after my rebuttal; I have no objection. [533]

Mr. Phelps: I am satisfied I can't do that, Syd. The only way I can get him down—he is a reluctant witness at best——

Mr. Murman: He is up at Anderson?

Mr. Phelps: Yes, and I would have to get a bench warrant; he has been served, and I don't want to do that, so if that is your position, I think then there is nothing I can do but take the practical

way out of just forgetting it now. I don't like to do that.

Mr. Murman: I am sorry. If there was some indication—I am afraid Mrs. Shanahan wouldn't like me to stipulate to that.

Mr. Phelps: Then I shan't mention that further in front of the jury.

Mr. Murman: I think you have got plenty of evidence about the whistling.

The Court: How many witnesses have you now?

Mr. Murman: I have three witnesses, two of whom will be very short, and one who will be a little longer. We should finish by noontime on the testimony, maybe before. If so, I will be glad to start my opening statement——

The Court: You gentlemen want to come in here then under the rule and be advised about what instructions I will give you?

Mr. Phelps: Yes, that is important in this case.

The Court: I am sorry that I am not giving all the plaintiff's exceptions, but I am modifying a couple. I am [534] making it very short, giving very nearly all the defendant's instructions except those which are here. I can hand them to you, and many of these are covered by my general instructions, see, and some of these I didn't feel like giving because they were more instructions on the fact than I think I should have given.

Mr. Murman: I noticed in my copy there are a group of some 65 to 75 missing. Was that a mis-numbering?

Mr. Phelps: Well, that was done——

Mr. Murman: I didn't mean to interrupt you, Judge.

Mr. Phelps: There were no exceptions in those intervening numbers, Mr. Murman.

The Court: Instruction No. 3 of your (indicating Mr. Murman), I am modifying two or three of what you charged and what the defendant charged.

Mr. Murman: Yes, I understand.

The Court: Now, the instruction you gave me, No. 16, is omitted to say, provided the defendant—provided the alleged negligence of the defendant was the proximate cause of the accident, also that the plaintiff—plaintiff's husband was free of fault. So I added that to that.

Mr. Murman: I can see your point and I guess what I had in mind, the other instructions.

The Court: A couple of yours I modified in certain respects here, but these are the ones I didn't give, but I [535] think you find in both instances—for instance, on this minor discrepancy here (indicating), and I gave a general instruction that practically covered it, and some of these others here I thought were more on the facts than would permit me to give, so you can——

Mr. Phelps: Yes.

Mr. Murman: Another thing, you want to renew your motion now so the Court——

Mr. Phelps: This moment?

Mr. Murman: It is too early?

(Whereupon the Court and counsel returned to the courtroom, and the following proceedings were had in the presence of the jury.)

Mr. Phelps: Pursuant to the instructions—discussions we have had in chambers and according to the stipulation agreed to by and between the parties, I want to state to the court the formal statement which I ask Mr. Murman to accept if it correctly states it as I understand it, he is willing to stipulate that Mr. Johnson, who is the man who has been described as the rear brakeman of the freight train which was in on the siding at the time of the accident at Anderson, and who has testified — who has been identified by Mr. Griffith, the conductor, as having been with him at the time Mr. Griffith observed the accident, that Mr. Johnson, the rear brakeman left the service of the Southern Pacific Company on December 31, 1948; that his present whereabouts are not known to me or anyone having any connection with the defense of this case; that on my request his personnel record was checked, all addresses and references which he made in his application to go to work were checked, and efforts were made to locate him at those addresses. They were unsuccessful and we were unable to find him in time for this trial.

Mr. Murman: So stipulated.

Mr. Phelps: With that stipulation, then, if your Honor please, the defense rests.

Mr. Murman: Plaintiff will call Mr. Whitfield to the stand. [537]

WILBERT G. WHITFIELD

called as a witness on behalf of the plaintiff, in rebuttal, sworn.

The Clerk: Will you state your name to the court and jury, please?

A. Wilbert G. Whitfield.

Direct Examination

By Mr. Murman:

Q. What is your business, Mr. Whitfield?

A. Criminal investigator with the Internal Revenue Service.

Q. The deceased in this case was connected with the Internal Revenue Service, is that correct?

A. That is right.

Q. Because of that fact you were delegated to go up and investigate the facts, were you?

A. I was.

Q. You went to Anderson, did you?

A. I did.

Q. And in accordance with your duties you made an investigation? A. I did.

Q. Now, among other things, did you talk to Mrs. Lela Johnson? A. I did.

Q. Where did you talk with her?

A. At her home in Anderson, on Douglas Street.

Q. Do you have any idea how far that building that she lives in was removed from the Howard Street crossing? [538]

A. It is about 500 feet.

Q. 500 feet. And when did you talk with her?

(Testimony of Wilbert G. Whitfield.)

A. I talked with her on December 31, 1948.

Q. At her home? A. At her home.

Q. Was there anyone else present?

A. Her husband, Carey Johnson.

Q. Now, did you ask her about her observations on the morning of the accident? A. I did.

Mr. Phelps: I will object, then, if your Honor please, as not proper impeachment, no proper foundation. It is now established another person was also present. Mrs. Johnson has never been asked about a conversation, no impeachment in the conversation in which another person was present other than Mr. Whitfield; without foundation.

Q. (By Mr. Murman): Just to remove any doubt, did you have more than one conversation with her?

A. I had just one conversation.

Q. Just one conversation, so that what you are referring to is the only conversation you had with Mrs. Johnson? A. That's right.

Mr. Murman: I think that removes——

The Court: I think so.

Mr. Phelps: Exception. [539]

The Court: I don't think the conversation should be given, simply the statements that you claim them to impeach her.

Mr. Murman: That is my intention.

The Witness: May I correct that? Carey Johnson was not at all times present during the statement. He came in during, that is during the con-

(Testimony of Wilbert G. Whitfield.)

versation he came in, during the last part at the time which I read the statement to Mrs. Johnson, and was a witness to her signature.

Q. (By Mr. Murman): So he was there during the latter part of the conversation?

A. That's right.

Q. But there was only one occasion when you talked with her? A. That's right.

Q. Now, did you ask her about what she heard in connection with the train? A. I did.

Q. What did she say, if anything, about a whistle?

Mr. Phelps: I object to that as not the proper way to impeach, if your Honor please, what she said, that could lead to anything. The only way is to ask an exact question.

Q. (By Mr. Murman): At that time or place, Mr. Whitfield, did she make the statement to you that "I did not at any time hear the train whistle blow?"

A. Yes, she did. I questioned her carefully on that point. [540]

Q. Now, did she also make the statement to you that there was no headlight on the car?

A. She did.

Mr. Murman: I have no further questions.

Cross-Examination

By Mr. Phelps:

Q. Mr. Whitfield, you say you are employed by

(Testimony of Wilbert G. Whitfield.)
the Criminal Division of the Department of Internal Revenue?

A. I am a criminal investigator with the Internal Revenue Service, Treasury Department.

Q. You made an investigation of this accident, did you not? A. Yes, I did.

Q. And in the course of that investigation you took statements from various parties and submitted various reports? A. I have.

Q. Now—— A. One report, yes.

Q. To whom was that report submitted?

Mr. Murman: I object to that as incompetent, irrelevant and immaterial, has no bearing on the issues in this case.

The Court: I will allow it.

Q. (By Mr. Murman): To whom was that report submitted? A. To my superior officer.

Q. And who is that?

A. F. L. Myers, investigator in charge.

Q. That was to go on to the Federal Compensation Commission, [541] isn't that correct?

Mr. Murman: If the court please, counsel should know, if he doesn't know, that the Compensation Commission has no connection with the Treasury Department, merely for the purpose of getting before the jury that which has no bearing on this. Object on that ground, not within the direct examination, it is way beyond direct examination, does not go to the issues of this case.

Mr. Phelps: I submit——

(Testimony of Wilbert G. Whitfield.)

The Court: I think it may indicate interest——

Mr. Phelps: I am trying to find exactly that, the interest.

The Court: I will allow it.

Q. (By Mr. Phelps): For this investigation, isn't that correct?

A. Where it routes from my superior officer, I have no knowledge, except that I believe our Legal Division gets a copy of it and they make all the recommendations from there on. Who else gets copies, I have no idea. I have nothing to do with the distribution of the report.

Q. You don't know anything further than what you just said? A. No, sir, that's right.

Q. Now, Mr. Whitfield, you made some notes of that conversation, did you?

A. Surely. [542]

Q. Do you have that, may I see it?

A. My notes of the conversation?

Q. Yes. A. Yes, I have a statement.

Q. May I see it?

Mr. Murman (To the witness): Do you have it with you? You'd better get it, I don't have it.

(Witness leaves stand to look for paper.)

Q. (By Mr. Phelps): You have a typed copy of this?

Mr. Murman: I don't know that I have anything more than a summary of it.

Mr. Phelps: Oh. Will your Honor excuse me and the jury for just a moment?

Mr. Murman: If counsel wishes to put in evi-

(Testimony of Wilbert G. Whitfield.)

dence based on the information, what I have here—what I have here is apparently a summary—I have no objection, provided it is properly identified.

Mr. Phelps: I would like to be heard on that. May we approach the bench, if your Honor please?

The Court: Yes.

(Counsel and court confer at the bench out of hearing of jury and reporter.)

Mr. Phelps: Mr. Whitfield, I will ask you if Mrs. Johnson on the occasion which you have already testified to, which you have said on your direct examination about the referring to [543] the whistle—— A. That's right.

Q. I will ask you if she did not say to you that she heard the heavy horn of the southbound passenger train in the distance and she looked east to see it going by, the horn was honking and the bell was ringing, but that she did not at any time hear the train whistles, isn't that a fact; isn't that what——

A. She did not at any time hear the whistle blow. That is what she told me. The heavy horn, she called it, but, "I did not hear the whistle blow." She was positive of that.

Q. Did she substantially say it the way I have summarized it to you just now?

The Court: Read it to him again.

Q. Did she tell you that she heard the heavy horn of the southbound passenger train in the dis-

(Testimony of Wilbert G. Whitfield.)

tance, that she looked straight east to see it going by, that the horn was honking and the bell was ringing, but she did not at any time hear the train whistle? A. That is what she said.

Q. Yes.

Mr. Phelps: I have no further questions.

Mr. Murman: No further questions.

(Witness excused.)

Mr. Murman: Call Mr. Tolson. [544]

WAYNE LeROY TOLSON

called as a witness on behalf of the plaintiff, in rebuttal, sworn.

The Clerk: Will you state your name to the court and jury, please?

A. Wayne LeRoy Tolson.

Direct Examination

By Mr. Murman:

Q. Mr. Tolson, you are appearing here pursuant to a subpoena, are you? A. Yes, sir.

Q. Where do you live?

A. At Cottonwood, California.

Q. Is Cottonwood near Anderson?

A. Yes, sir.

Q. Do you live in Cottonwood or out somewhere?

A. Just outside of Cottonwood, about seven miles west of Cottonwood.

Q. On a ranch?

A. On a ranch.

(Testimony of Wayne LeRoy Tolson.)

Q. A year ago did you live near Anderson?

A. I did.

Q. Were you living in the town?

A. No, about a mile and a half north of Anderson on the river.

Q. You had a little acreage up there, did you?

A. I did.

Q. What is your business, Mr. Tolson?

A. At present I am pulling lumber at the Smith Lumber Mill about a mile and a half south of Anderson.

Q. Where were you working a year ago?

A. No.

Q. Where were working a year ago?

A. I was working at the High Tower Service Station and Feed Store.

Q. Where is that?

A. Directly in Anderson.

Q. With respect to the railroad tracks, where was it located?

A. Directly across from the Howard Street crossing.

Q. How long had you been working there?

A. Oh, about two years. I think I went to work there about September, two years apart.

Q. I show you defendant's exhibits E, G, H, I and O, which purport to be pictures showing you the location you have just referred to, and ask you to look at those pictures and state whether or not they show the service station you mentioned?

A. They do, sir.

(Testimony of Wayne LeRoy Tolson.)

Q. And does that service station also appear on the lefthand side of this panorama photo, which is defendant's exhibit L? A. That is right.

Q. Apparently it is more than just a service station there. [546] Were there any other parts of that establishment in which you were working?

A. Yes, sir, a ice house, feed store and lubrication room.

Q. Those are all marked right on there?

A. That is right; this is the feed store and the lubrication room and the service station.

Q. Pointing to defendant's exhibit L, in evidence. Were you there on the morning of December 27, 1948? A. I was, sir.

Q. You remember that morning, do you?

A. Pretty well in mind.

Q. About what time did you come to work there that morning?

A. I would say 7:00 o'clock.

Q. And what was the nature of the weather that morning?

A. It was really dark and misty.

Q. What did you do after you got there at 7:00 o'clock.

Mr. Phelps: I am going to object to this. It may be preliminary, and if it is, I submit it, of course, but I haven't seen yet where this leads to any rebuttal.

Mr. Murman: Well, it will. It is all preliminary, your Honor. We have to get the picture, first.

(Testimony of Wayne LeRoy Tolson.)

Mr. Phelps: Yes, well——

Mr. Murman: I can assure you it is rebuttal.

Mr. Phelps: All right.

Q. (By Mr. Murman): What did you do after you got there at [547] 7:00 o'clock?

A. My first duty is to open up the store, unlock the ice room and feed store and get the — from them I usually got the air hoses out and water hoses, connected them up, and then I usually went into the rest rooms and—they are in back of the service station—and cleaned those up, because those are left open for the public use. It's the only service station or rest rooms in town you could use. They were left open. I usually went back and cleaned those and then I was ready for business.

Q. Then you were ready for business?

A. Yes, sir.

Q. Did you stay on the premises that morning?

A. I did.

Q. Do you remember an accident occurring there that morning? A. I did.

Q. By the way, how far is the service station from the Howard Street crossing?

A. I would estimate between, oh, 80 to 100 feet across the highway.

Q. Did you know there was a signal of some kind at the Howard Street crossing? A. Yes.

Q. What kind? A. A wig-wag. [548]

Q. What kind? A. Wig-wag.

Q. Just before the collision occurred, what were you doing?

(Testimony of Wayne LeRoy Tolson.)

A. Just before the collision occurred I was servicing a pickup with a small amount——

Q. What is a pickup?

A. Well, a car, an automobile.

Q. An automobile?

A. I was giving—filling it with gas. I think he ordered five gallons of gas, if I remember rightly.

Q. You were actually putting gas in the tank?

A. I was putting gas in the tank.

Q. You were watching the tank, then?

A. I was watching the meter or the pump because I was just about through at the time.

Q. Did you hear the collision occur?

A. I did.

Q. Prior to hearing the collision occur, did you hear anything in the nature of a crossing bell?

Mr. Phelps: Objected to as incompetent, irrelevant and immaterial, and not proper rebuttal. If that is to be brought out, it is to be brought out in the case in chief.

Mr. Murman: It is rebuttal of at least two witnesses who testified that the bell was ringing, Mrs. Johnson and Mr. Griffith. [549]

Mr. Phelps: That was part of your case.

Mr. Murman: No, Mrs. Johnson and Mr. Griffith testified it was ringing.

The Court: The point is, isn't it part of your case? They were just rebutting your case when they testified to that. However, I will allow it.

Q. (By Mr. Murman): Do you know what the question was? A. Repeat it, please.

(Testimony of Wayne LeRoy Tolson.)

Q. Just prior to the collision did you hear the signal bell ringing?

A. I don't recall it, no.

Q. Now, you had been there prior to the collision for some time? You said two years?

A. Two years.

Q. Do you recall any occasion prior to the collision when the wig-wag signal did not operate?

Mr. Phelps: Objected to as incompetent, irrelevant and immaterial, and not proper rebuttal. It is part of your case in chief, and it has no bearing on the issues in this case. The evidence now is that the wig-wag had worked. There is no evidence at all—it was working on two occasions within an hour of the accident, and anything prior to that would be remote and has no bearing on the case. It is too late at this time.

Mr. Murman: You Honor will recall Mr. Rowe, the signal [550] man, testified he had been maintaining that signal for four years, and upon my cross-examination he very definitely said at no time during that four-year period, particularly during the month preceding this accident, had that signal ever been out of order; that he had serviced it every day. I want to show by this witness that is not a fact.

Mr. Phelps: That would not establish any negligence. There was an objection to that question. I think it was overruled, but I don't think it is proper rebuttal and certainly is not admissible on the issue of negligence.

(Testimony of Wayne LeRoy Tolson.)

The Court: I think it is an attempt to impeach a witness on a collateral matter. Sustain the objection.

Mr. Murman: Does your Honor mean by that ruling that I can not ask this witness concerning the operation of that signal prior to the accident, as to the trapper operation, when the witness for the defense testified as he did? I am foreclosed from asking him on that subject?

The Court: What is the time? How remote is this?

Mr. Murman: Your Honor will recall, I believe, I asked Mr. Rowe whether or not it wasn't true that three or four months prior to the accident that signal had been out of operation for a whole working day, and he said it had never been out of operation at any time.

The Court: That is a collateral matter.

Mr. Phelps: It is a collateral matter. [551]

Mr. Murman: No, it goes to knowledge on the part of the defendant that the signal was a signal that could not be relied on. Mr. Phelps made the point on his objections that momentary failure of a signal is not to bind the defendant, and he produced Mr. Rowe to prove the signal had never been out of operation before.

Mr. Murman: We had established our part of the case prior to that. This is rebuttal of Mr. Rowe's testimony. It is particularly as to that one witness who is the only one who testified on that subject.

(Testimony of Wayne LeRoy Tolson.)

Mr. Phelps: May it please the court, I did not produce that. As I recall, it came out on cross-examination over my objection that it is a collateral matter and too remote and did not bear on the issues. I think your Honor is perfectly right, it would be collateral and couldn't have any purpose, couldn't serve any purpose at this time.

The Court: It deals with something four months before.

Mr. Murman: I am asking if I am precluded from any time prior to the accident, to bring that up.

The Court: The question addressed to Mr. Rowe, as I recall, was four months before.

Mr. Murman: Three or four, as he definitely said no, not at any time. I want to show by this witness that that is not the fact, and that is the purpose of it.

Mr. Phelps: Then I enlarge on the objection, if your [552] Honor please, that as far as Rowe is concerned, it couldn't be impeachment of the witness Rowe at this time. There would be no foundation to show the witness Rowe knew about this incident which is alleged.

Mr. Murman: Yes, it would impeach him.

Mr. Phelps: It is still a collateral matter.

Mr. Murman: He said on every occasion he tested that, on every working day, and every occasion it was working properly, and counsel made the point in his argument on the motion that if the Southern Pacific didn't have knowledge of the

(Testimony of Wayne LeRoy Tolson.)

signal not being one that could be relied on, we haven't established negligence. He produces a witness that tends to indicate that is the fact. He did that on his case. This is rebuttal of that witness, and I submit it is proper. It is proper for the plaintiff to show that.

Mr. Phelps: Purely collateral issue.

Mr. Murman: It would be a purely collateral issue had counsel not established that point in his own testimony and absolutely stated the signal had never been out of order during the four years. I am not going back four years' time, but I would ask him specifically on the three or four months before that.

Mr. Phelps: If the court please, he asked the question over my objection and he got an answer and now he wants to do this. It is too late. [553]

The Court: I think I will sustain the objection.

Mr. Murman: Then I want to protect the record, and I will ask the other questions, and if counsel objects we will have to take the ruling.

Mr. Murman: Mr. Tolson, prior to the accident did you on any occasion notice that the signal stuck and remained in a position other than a vertical position after a train went by?

Mr. Phelps: Same objection, if your Honor please; it isn't proper rebuttal, wouldn't tend to impeach——

The Court: It isn't proper rebuttal. It really isn't proper rebuttal. You should have put it in at the beginning of your case, but I will allow the

(Testimony of Wayne LeRoy Tolson.)

question if it is directed to a point that is within a reasonable time.

Mr. Murman: All right.

The Court: A day or so before or afterwards, maybe even a week.

Mr. Murman: All right, I will ask that question.

Q. Mr. Tolson, how long——

Mr. Phelps: I want to enlarge on the objection, that it is leading and suggestive.

The Court: Yes, but I will allow it.

Mr. Murman: Mr. Tolson, how long prior to the date of the accident do you last remember seeing the signal in a position other than a vertical position? [554]

Mr. Phelps: Same objection, your Honor understands, runs to this line of questioning?

The Court: Yes.

Mr. Phelps: It wouldn't tend to impeach this witness, even remotely tend to impeach the witness. He was never asked about it. No notice on the part of the Southern Pacific Company.

A. Other than through his testing, that I would say, it was within, oh, 30 days, anyway. I have seen him when he was testing, it would hold in that position where it wasn't centered.

Mr. Phelps: I will ask that go out as too remote.

Q. (By Mr. Murman): When did the signal get that way?

A. When he was testing it.

Q. You said within 30 days of the accident?

A. I would say something like that. I don't

(Testimony of Wayne LeRoy Tolson.)

remember the exact time or date, never paid particular attention to its position, but I have seen him take the signal and test it where it wouldn't be centered, and would stick to one side or the other and wouldn't come back.

Q. That was when he was testing it?

A. That was when he was testing it.

Mr. Phelps: May I please——

The Court: How long before the 27th day of December was this? [555]

A. Well, directly, a direct day I couldn't answer that only just by saying it was within 30 days, sir, or something like that. It wasn't—it didn't come into my mind exclusively just what time that would be.

Mr. Phelps: Then, if your Honor please, I ask that the answer go out as too remote even under your Honor's ruling, confined within a day or two.

Mr. Murman: I submit it is rebuttal.

Mr. Phelps: It is not rebuttal.

The Court: I am going to strike the answer and instruct the jury to disregard the testimony. It isn't rebuttal and not impeachment.

Mr. Murman: Well, I beg to differ with your Honor, and under the circumstances I have no further questions.

Cross-Examination

By Mr. Phelps:

Q. Now then, Mr. Tolson, you were asked——

(Testimony of Wayne LeRoy Tolson.)

Mr. Phelps: Your Honor please, I don't want to be wrong in this, but my recollection is that your Honor did permit this witness to testify as to whether or not he heard the bell at the time of the accident.

The Court: That is right.

Mr. Phelps: Over my objection.

Q. Now, then, Mr. Tolson, directing your attention entirely to the day, that one occasion that you have testified to, I will ask you whether it is not a fact that you do not recall [556] noticing whether the wig-wag was operating or hearing the bell—if it isn't the fact that you are so accustomed to hearing the signal in operation that you paid no attention to it, and isn't that a fact?

Mr. Murman: That is objected to as compound, complex, and calling for a series of answers. I suggest counsel reframe it.

Mr. Phelps: All right. Let's take them one at a time. I will reframe the question.

Q. I will ask you again, directing your attention to that one occasion, if it isn't a fact that you don't recall noticing whether the wig-wag signal was operating? A. I don't recall.

Q. That is the fact, is it not? Or that you do not now recall hearing the bell, that is the fact, isn't it? A. That is the fact.

Q. It is also the fact, is it not, that you are so accustomed to hearing the signal in operation that you paid no attention at all on that occasion?

(Testimony of Wayne LeRoy Tolson.)

A. At that station, I was occupied at the time being.

Q. Yes, and as a matter of fact you do not know whether the signal was operating prior to the accident or at the time of the accident?

A. What do you mean by prior to the accident?

Q. Prior to this. [557]

A. Just a few minutes before?

Q. Just before the accident, yes.

A. No, I don't.

Q. You don't know one way or the other, isn't that the fact, Mr. Tolson?

A. That is right.

Q. And you weren't paying any attention whether it was working or whether it wasn't?

A. I was occupied and I didn't pay particular attention, that is right.

Q. And it is true that one of the reasons you didn't pay any attention was that you are so used to hearing it that you don't pay any attention?

A. I am accustomed to that noise, yes.

Mr. Phelps: No other questions.

Redirect Examination

By Mr. Murman:

Q. Did you give a statement to somebody from the Southern Pacific Company as to your recollection?

A. I did.

Mr. Phelps: Objected to as incompetent, irrelevant and immaterial.

Mr. Murman: All right, no further questions.

The Court: That is all.

(Witness excused.)

Mr. Murman: Call Mrs. Shanahan, please. [558]

NELDA SHANAHAN

recalled on her own behalf, in rebuttal, previously sworn.

Direct Examination

By Mr. Murman:

Q. Mrs. Shanahan, there has been some suggestion here that this car that was wrecked was your husband's car. What is the fact about that?

A. It was in my name.

Q. Who purchased it?

A. I purchased it before we were married and was paying for it on contract and the payments were completed after we was married.

Q. It was in your name, is that correct?

A. Yes.

Q. After the accident did you dispose of it?

A. I did.

Q. As junk? A. Yes, sir.

Mr. Murman: No further questions.

Mr. Phelps: I have no questions, your Honor.

(Witness excused.)

Mr. Murman: Plaintiff rests.

Mr. Phelps: Then, if your Honor please, there is a matter we can take up in the absence of the jury. However, I see it is 11:00 o'clock.

The Court: Yes, we will take a recess as far as the jury [559] is concerned for ten minutes. During

the recess, will you bear in mind the admonition I have heretofore given you. Will you take the jury out?

(Thereupon the jury left the court room and the following proceedings were had outside the presence of the jury.)

Mr. Phelps: I will endeavor to be as brief as I can.

At this time on behalf of the defendant, Southern Pacific Company, I move for a directed verdict, that is, that a verdict be directed in favor of the defendant, Southern Pacific Company, on all the grounds heretofore stated and as enlarged upon in the argument on motion for non-suit. Specifically, I would like to direct your Honor's attention to the—and ask that the motions be deemed to be made separately and severally as to each of the charges of negligence, namely, first the charge of negligence in the maintenance and operation of the crossing signal and warning device, and then separately and severally, in the event that that motion be denied, reserving the right of course that it also be deemed to be made as I have directed verdict on the second ground or second charge of negligence, of the negligent operation of the train.

I would like to state also, if your Honor please, that the grounds are that as a matter of law there appears no negligence on the part of the defendant, Southern Pacific Company, in the maintenance and operation of the crossing signal and warning device; that there is no negligence in the [560] opera-

tion of the train, as a matter of law; that there is no act or omission on the part of any officer, agent, servant or employee of the defendant, Southern Pacific Company, that proximately contributed to the accident here; and, further, on the ground that the deceased's own conduct contributed proximately to the accident, as a matter of law, so as to cause the accident and to bar this action; and enlarging upon these grounds by stating that in all ways stated on the argument on motion for non-suit.

I can anticipate your Honor's ruling. May I have a ruling, because I have another alternative motion to make.

The Court: I will at this time deny the motion.

Mr. Phelps: Yes. Then, if your Honor please, that motion having been denied, I would like to move separately, as I know of no procedure, no other procedure, to raise this point; that the court withdraw from the jury the issue, first, of the charge of negligently maintaining the crossing signal and warning device, both as to the maintenance and as to the operation, on the ground that there is no evidence, not one scintilla of evidence, that there was negligence in the maintenance of the crossing signal or warning device, and there is no evidence of any negligence in the operation of this crossing signal or warning device; and separately and severally, of course, that the issues of the negligence in operation of the train lights be withdrawn from the jury in the event the [561] other is denied, or, alternately, if the first is denied that the second

be withdrawn, and if the second is denied that the first be withdrawn.

The Court: I will deny both of them.

Mr. Phelps: Very well.

The Court: We will take a recess for five minutes, then you will proceed with your argument?

Mr. Phelps: What is the court's pleasure as to the time?

The Court: I would like to have you at noon time look over that so that you will be ready quickly with your objections.

Mr. Phelps: I can do that very quickly. I have in mind what your Honor's pleasure is on time. Can Mr. Murman finish his opening by noon? If it is close to noon—well, maybe I can break my argument.

The Court: I would like to leave here at 3:30 if I could.

Mr. Murman: We should be able to finish, your Honor.

The Court: I would like to have you finish by 3:30. We will come back at 1:30.

Mr. Murman: That will be agreeable.

The Court: That will give you two hours this afternoon, and I suggest you finish, if you could, your opening statement before noon. [562]

Mr. Murman: Oh, I will, I will.

The Court: Recess five minutes.

(Recess.)

(Thereupon counsel for both sides argued.)

Reporter's certificate attached. [562A]

[Title of District Court and Cause.]

INSTRUCTIONS TO THE JURY

December 30, 1949, at 9:30 A.M.

The Court: The presentation of evidence in this case has been concluded and you have listened to the arguments of counsel. Let me say to you, first of all, that it is your exclusive province to judge the facts of this case. It is the exclusive function of the Court to instruct you as to the applicable law, which, in turn, you will apply to the facts.

I express no opinion as to the facts or the evidence. Nor do I wish you to understand or conclude from anything I may have said during the trial, or in the course of my instructions, that I have intended directly or indirectly to indicate any opinion on my part as to the facts or as to what I think your finding should be. Ladies and gentlemen, you and you alone must decide the facts. In your deliberations you must wholly exclude any sympathy or prejudice from your minds.

Whether or not you believe the witnesses who have testified in this case and the weight to be attached to their testimony respectively is a matter for your thorough and exclusive judgment. A witness is presumed to speak the truth, but this presumption may be negatived by the manner in which he testifies, by his motives, or by evidence as to his character and reputation for truth, honesty and integrity. In passing upon the credibility of the various witnesses, it is your right to accept the

whole or any part of their testimony or to discard or reject the whole or any part thereof. If it is shown that a witness has testified falsely on any material matter, you should [2*] distrust his testimony in other particulars, and in that event you are free to reject all of the witness' testimony.

This being a civil action, the plaintiff has the burden of proof. A preponderance of the evidence is sufficient to sustain that burden.

By a preponderance of the evidence is meant that the testimony on behalf of one party has greater weight and has more convincing weight than that of the other party. It does not necessarily depend upon the number of witnesses testifying, but rather upon the character of the testimony with reference to its probable truth or falsity.

In determining the preponderance of evidence, it is your duty to scrutinize carefully the testimony given and in so doing consider the following: the circumstances under which the witness testifies; his or her demeanor and manner on the stand; his or her intelligence; the connection or relationship which he or she bears to either party; the manner in which he or she might be affected by the verdict; the extent to which he or she is contradicted or corroborated by other evidence, if at all; and any other matter which reasonably sheds light upon the credibility of the witness.

You must disregard entirely any testimony stricken out by the Court or any testimony to which an objection has been sustained.

* Page numbering appearing at top of page of original certified Reporter's Transcript.

The attorneys in their arguments have commented upon and [3] argued upon the facts. If you find any variance between the facts as testified to by the witnesses and what has been stated to you by counsel to be the facts, to the extent of such variance you must consider only the facts as testified to by the witnesses.

From time to time counsel for the opposing parties have made objections to questions asked or evidence offered. You must not be prejudiced against any party or his attorney by reason of such objections. Likewise, you must not feel that such objections were made for the purpose of hiding the truth. It is the duty of a lawyer representing a client in court to make such objections as he may think proper and to secure a ruling of the Court thereon. By failing to do this he might waive important legal rights of his client.

If in these instructions any rule or idea be stated in varying ways, as for example, that you are to find for one of the parties if you find certain facts to be true, no emphasis thereon is intended and none must be inferred. You are not to single out any certain sentence or any individual point or instruction and ignore the others. You are to consider all of the instructions as a whole and regard each in the light of all the others.

Discrepancies in a witness' testimony or between his testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure [4] of recollection is a common experience, and innocent misrecollection is not un-

common. It is a fact, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance. But a wilful falsehood always is a matter of importance and should be seriously considered.

The defendant Southern Pacific Company is a corporation and as such can act only through its officers and employees who are its agents. The acts and omissions of an agent, done within the scope of his authority, are, as a matter of law, the acts and omissions respectively of the corporation whose agent he is. You are instructed that under the facts of this case the Southern Pacific Company, as the employer, is responsible for the negligence, if any, committed by its employees in the course of their employment.

You have been instructed that a corporation can act only through its servants, agents and employees, and from this it results, so far as this case is concerned, that if there is no negligence on the part of any servant, agent or employee of the defendant Southern Pacific Company, it will be your duty to return your verdict in favor of the defendants.

If evidence for the defendant has been given by its employees, if you find that the testimony of such an employee is not inherently improbable, is uncontradicted, and the employee [5] and his testimony are unimpeached, then you are not at liberty to disregard that testimony solely upon the ground

that it is given by one of defendant's employees. Nor are you to discredit the testimony of an employee solely because you may discredit, if you do discredit, the testimony of some other witness.

In this action for damages for personal injuries plaintiff alleges in Paragraph V of her complaint as follows:

“On or about December 27, 1948, shortly before 8 o'clock a.m. of said day, said Ellis E. Shanahan was operating a certain automobile along Howard Street, a public street and thoroughfare in the vicinity of the tracks and right-of-way of defendant corporation in Anderson, California.

“At about said time and place, defendants so maintained and operated the crossing signal and the warning device of defendant corporation in such a careless, reckless and negligent manner as to cause a certain locomotive and train of defendant corporation, then and there carelessly, recklessly and negligently proceeding in a southerly direction along said tracks and right-of-way, to strike and collide without warning with said automobile, with great force and violence, demolishing said automobile and causing said Ellis E. Shanahan, the operator thereof, to receive and sustain serious bodily injuries, [6] from which injuries said Ellis E. Shanahan died.”

Plaintiff further alleges in her complaint that as a proximate result of the death of said Ellis E.

Shanahan, plaintiff was and has been deprived of the support, maintenance, society and comfort of said deceased, and was and has been thereby damaged, which damages resulted solely and proximately from the carelessness, recklessness and negligence of the defendant Southern Pacific Company.

The defendant Southern Pacific Company alleges in its answer and claims that the death of Ellis E. Shanahan was not caused by any negligence or lack of any ordinary care on its part, or on the part of its agents, or employees, but was due to the carelessness and negligence of the decedent in driving into the path of an oncoming train.

The foregoing is stated to you for the purpose of enlightening you as to the issues of fact, and is not an expression by the Court of an opinion as to the facts.

Every person is bound without contract to abstain from injuring the person or property of another, or infringing upon any of his or her rights. Everyone is responsible not only for the results of his unlawful acts, but also for an injury occasioned to another by the want of ordinary care or skill in the management of his property or person except insofar as such person as wilfully or by want of ordinary care brought injury upon himself. Every person who suffers injury from the [7] negligent act or omission of another is entitled to recover money therefor in the form of damages.

The gist and gravamen of plaintiff's action is negligence. The plaintiff must prove negligence or there can be no recovery. The defendant, South-

ern Pacific Company, is not an insurer. It is not liable simply because there was an accident and injury, if that was without fault on its part. Nor is it liable simply because there may be some danger in connection with its normal and customary railroad operations. Nor is it enough to show only that if it and its employees had acted in some way different from the way in which they did act, the accident might not have happened. To the contrary, you cannot find against Southern Pacific Company unless the plaintiff proves two things by a preponderance of the evidence: first, that there was negligence in the particulars charged in the complaint; and, second, that such negligence, if any there was, was a proximate cause of the accident. The defendant does not have the burden of proving freedom from negligence. To the contrary, the burden of proving negligence is on the party who charges it, and, in this case, as to any claimed negligence of Southern Pacific Company or its employees, unless the plaintiff sustains the burden of proving it by a preponderance of the evidence, your verdict must be in favor of defendant.

Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily [8] regulate the conduct of human affairs, would do under the circumstances; or the doing of something which such a person, so guided, would not do under the circumstances. It is always a relative question, relative to the circumstances of the time, of the place, and of the person or persons.

I have also mentioned to you that the plaintiff may not recover unless it is shown that some negligence on the part of the defendant proximately caused the death of her husband. The term "Proximate cause" is defined to mean that which in a natural and continuous sequence, unbroken by any new, independent cause, produces the event, and without which that event would not have occurred. It is the efficient cause, the one that necessarily sets the other causes in operation.

In considering the claim that the defendant was negligent you will bear in mind that a defendant is liable only for failure to exercise such care as men of ordinary prudence and caution would exercise in the circumstances, and that the presumption is that the party has exercised such care as men of ordinary prudence and caution would exercise under similar circumstances; that is to say, in the absence of proof, you must take it that a defendant was not negligent. If a defendant was negligent, that is a matter for the plaintiff to prove. If no such proof has been made, the case stands as one of unavoidable accident, for the consequences of which a defendant is not responsible. Sometimes accidents happen and persons are [9] injured where there is no fault on the part of any party involved in the accident. Such accidents are called inevitable or unavoidable accidents. If you find that the accident out of which this case arose was an unavoidable accident, then plaintiff is not entitled to recover anything and your verdict must be against the plaintiff and in favor of the defendant.

In a moment of unexpected emergency and imminent danger, a person is not held to the use of the degree of prudence or judgment that one may exercise in an interval of calm where there is time for reflection and deliberation.

You cannot return a verdict against defendant Southern Pacific Company merely because an accident happened and death resulted from it. The mere happening of an accident raises no presumption or inference of negligence on the part of a defendant. The plaintiff has the burden of proving by a preponderance of the evidence that defendant was guilty of negligence which proximately caused the death complained of. In carrying the burden of proof, plaintiff is not aided or assisted by any presumption or inference arising from the mere fact of accident and death. You must not assume or find, merely because it is undisputed, that an accident happened in which Ellis E. Shanahan was killed, that there was negligence on the part of any defendant nor that the defendant is legally responsible for the happening of the accident, or the result of the accident. Negligence of the defendant which was a proximate cause of the accident [10] is an affirmative fact which plaintiff must prove. Unless plaintiff over and above the circumstance that there was an accident and death, has produced evidence of negligence upon the part of defendant which proximately caused the death complained of, your verdict must be in favor of defendant.

Defendant Southern Pacific Company was not re-

quired to exercise the utmost degree of care which the human mind is capable of imagining, nor was it required to exercise a greater degree of care than was required of any individual engaged in the same business. All that was required of defendant was the exercise of ordinary care, such care as an ordinarily prudent person would exercise consistent with the practical operation of the railroad and in the same circumstances. The person whose conduct is set up as a standard by which to measure the conduct of the defendant is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of only ordinary prudence. The law does not demand of defendant exceptional or extraordinary or unusual skill or caution, but requires only ordinary care in conducting its railroad operations at the place where the accident happened. The defendant was not required to take steps against unanticipated eventualities and happenings which were not reasonably to be foreseen.

I instruct you that as a matter of law the rules with reference to the rights and duties of parties in the accident [11] here complained of and in this lawsuit are not, in all respects, those which would apply in the case of a person approaching or crossing the tracks of a street railroad, laid on a street in a city, but, to the contrary, are in some respects distinct, and are rules which the law has worked out as particularly applicable to steam railroads. These rules which are specifically applicable to steam railroads will be given to you in these instructions, but I call to your attention that they are

in some respects different from the rules for street railroads, and this is true both as to the rights and duties of persons approaching or crossing the tracks and as to the rights and duties of the operators of the train.

The operators of the train in question had a right to operate it along the railroad right-of-way and over the crossing. In so operating the train the only duty in respect to operation of the train itself was the duty to give the statutory signals and to exercise ordinary care in the circumstances. In the absence of a showing to the contrary, the law presumes that the operators of the train performed their statutory duties and used such care. This presumption is evidence for the defendant and it remains as evidence in the case until met or overcome by other evidence, if any.

The mere fact, if it be fact, that the railroad operations being carried on at the time and place Ellis E. Shanahan was killed were accompanied by risks and hazards of injury to [12] travelers of the highway, if that is the fact, does not of itself show negligence on the part of defendant Southern Pacific Company. If the defendant performed its statutory duties, exercised ordinary care in the conduct of its business and the operation in question, it was not negligence on its part to engage in and to continue such operations, exercising such care, even in the face of risks, hazards and dangers, if such there were, necessarily and unavoidably inherent in such operations so conducted, and if, as a

result, in such circumstances, and in the course of operations so conducted the operator of an automobile was killed as the result of such a risk, hazard, or danger, responsibility for his death cannot be imposed on defendant Southern Pacific Company on that account.

Where a railroad train is operated toward and over a crossing at which the railroad has protection and at which reasonable warnings of the train's approach are being given, and the warnings are readily discernible by any person approaching or near the tracks and exercising reasonable care for his own safety, the operators of the train are not required to exercise as much care in the operation of the train as they would if the circumstances were the same except that there were no such warnings and no such protection.

The owner and operator of a train is bound to exercise ordinary care in crossing public highways commensurate with the conditions existing and the hazards to be encountered. The [13] maintenance by a railroad company of a signal at a railroad crossing is an invitation to a person approaching the crossing to rely upon the efficient operation of the device. One who exercises ordinary care in giving attention to such a device and who relies upon the operation of the same is not required to use the same amount of caution in looking and listening for an approaching train as is required when no method of warning is provided by the railroad company or when one does not exercise ordinary

care in making use of the protective system that is provided.

As to the railroad crossing in question, you may consider whether the conditions maintained by and the conduct of the defendant Southern Pacific Company at the time of the accident was such as to give to a reasonably prudent person assurance of safety in entering upon the track area and to expressly or impliedly invite the deceased to enter that area without making precautionary observations that one usually should make in approaching and crossing railroad tracks.

If defendant Southern Pacific Company had installed at the crossing where this accident happened an automatic signal so designed as to be actuated by a train which would approach the crossing, and placed and designed to give warning of the approach of such a train, then even if that signal was not operating on the occasion of this accident that fact would not constitute any evidence of negligence on the part of Southern [14] Pacific Company if there is no other evidence of want or care on the part of the Southern Pacific Company. The mere fact that an automatic signalling device fails to work is not of itself any evidence of negligence, and unless over and above that fact the plaintiff introduces evidence of want of care in respect of the device, the mere failure of the device to operate on a particular occasion is no ground for imputing liability to the defendant. Where an automatic crossing warning signal has been installed before

liability can be imposed for failure in its operation, if by a preponderance of the evidence appears that it did in fact fail to operate, the plaintiff must prove that the device was improperly constructed, devised or installed, or that the defendant was negligent in maintaining it, and if it was properly constructed, devised, and installed there was no negligence in its maintenance unless it is shown that it was out of repair and the defendant actually knew it was out of repair, or that it was out of repair and was out of repair for so long that the defendant should have discovered this fact in the exercise of ordinary care, and if the plaintiff fails to prove both of these facts then there is no evidence of any negligence with respect to maintenance of the device.

The law presumes, and the defendant railroad and its employees were entitled to presume and assume, according to the ordinary course of nature and the ordinary habits of life, [15] that a person possessing normal faculties of sight and hearing would see and hear that which was in the range of his sight and hearing. The men conducting the railroad's operations were also entitled to presume and assume, until put on notice to the contrary, if that is the fact, that any person who might be within the possible range of those operations was a person possessing normal faculties of sight and hearing.

In considering the conduct of the men in charge of the railroad locomotive and cars, you must remember that, until put on notice to the contrary,

the railroad men had the right to assume and presume that any person in or moving into the range of the railroad operations would perform the duty which the law imposed, would reasonably exercise all natural faculties of observation and caution, and would not attempt to cross the track in dangerous proximity to an approaching locomotive if the same were so open to view that collision could be avoided if reasonable care were exercised and if the duties imposed by law were performed. Accordingly, in considering this case you must consider the duties which the law imposed upon Ellis E. Shanahan, the driver of the automobile which was driven in front of the approaching railroad train, not only from the point of view of determining whether there was any negligence on his part, but also from the point of view of the bearing which the duties he was required to perform, and which in the absence of notice to the contrary the railroad men were entitled to assume would be [16] performed, may have on the claim of negligence on the part of defendant.

You are further instructed that the law of the State of California provides that an appropriate bell must be placed on each locomotive engine and be rung at a distance of at least 80 rods, or 1320 feet, from the place where the railroad crosses any street, road or highway, and that the same must be kept ringing until the locomotive has crossed such street, road or highway. In lieu of a bell, a steam whistle, air siren or an air whistle must be

attached to each locomotive engine and be sounded at a like distance and be kept sounding at intervals until the engine has crossed such street, road or highway. If you find from the evidence that the defendant in this case failed to comply with the foregoing provisions of the law, and that such failure, if any, was the proximate cause of the accident without fault of the part of plaintiff's husband, then you will find the defendant is liable for all damages sustained by the plaintiff and caused by defendant's locomotive, train or cars.

I have instructed you with respect to a statute which provides for the blowing of a whistle or the ringing of a bell when a steam train is approaching a railway crossing. In this regard, I further instruct you that, in order to comply with this statute, it is not necessary for the railroad company to both ring a bell and blow a wistle, but, on the contrary, the doing of either one or the other in compliance with the statute [17] is sufficient, so that if the bell has been rung, as provided in the statute, the whistle need not be blown, and if the whistle has been blown as provided in the statute, the bell need not be rung. If the whistle is used, it need not be sounded continually, but it is only required that it be sounded at intervals. Of course the railroad may, if it so desires, go beyond the terms of the statute and cause both the bell to be rung and the whistle blown.

Under the statute which deals with the sounding of whistle or bell by a steam locomotive, it is

the sounding or giving of the warning and not the hearing of it which determines the question of statutory violation. Of this phase of the case the only issue is whether a signal, as required by the statute, was sounded. If a signal was sounded, as required by the statute, the fact that it may not have been heard by some person is not ground for finding that the statute was violated, or that the railroad or its employees were negligent.

If as the train was proceeding toward the crossing it sounded the warning of its approach required by the statute, if these warnings were such that they could have been heard by an ordinarily prudent person in the exercise of ordinary care for his own safety, who was within the range of the movement of the train, and if in giving such signals those in charge of the train were exercising ordinary care in the circumstances, then there was no negligence in respect of warnings from the train, [18] and, if the defendant railroad and its employees were free from fault in other respects, defendant is entitled to your verdict.

There is no statute of this State, nor any ordinance, which required that at the time of the accident here in question the railroad crossing be guarded by a human flagman or gates or other barriers or any wig-wag or other warning or protective device. Defendant railroad, however, if it elected to do so, was at liberty to voluntarily to maintain some such protection at the crossing. If it did so, it went beyond the requirements of any ordinance or statute.

There is no statute of this State, nor any ordinance or other rule of any governmental body, fixing or restricting the speed at which Southern Pacific Company may operate its trains on its tracks along its right of way, and over the public highway, at the point at which the accident complained of happened.

In considering the manner of the operation of the railroad train, particularly with respect to speed, one of the matters to be considered is that the defendant railroad was a common carrier and was under a legal duty to provide such train service as would meet the reasonable needs of the general public. In providing such service defendant was under a duty to fix and maintain such schedules as would provide adequate and efficient railroad transportation and to operate at speeds which would enable its trains to meet such schedule, subject to its duty to [19] exercise reasonable care. Accordingly, in considering whether the speed of the train was reasonable and proper, a matter to be taken into consideration is the duty which the railroad owed to the general public to provide adequate and efficient service.

If the locomotive and care were operated toward the point of accident in the usual and customary way, proper warnings were sounded by its locomotive, a look-out was kept by the train crew and the operation was at a reasonable speed, regard being had for all the circumstances then existing, and if in so operating the railroad crew was using the care that ordinarily prudent men would have

the sounding or giving of the warning and not the hearing of it which determines the question of statutory violation. Of this phase of the case the only issue is whether a signal, as required by the statute, was sounded. If a signal was sounded, as required by the statute, the fact that it may not have been heard by some person is not ground for finding that the statute was violated, or that the railroad or its employees were negligent.

If as the train was proceeding toward the crossing it sounded the warning of its approach required by the statute, if these warnings were such that they could have been heard by an ordinarily prudent person in the exercise of ordinary care for his own safety, who was within the range of the movement of the train, and if in giving such signals those in charge of the train were exercising ordinary care in the circumstances, then there was no negligence in respect of warnings from the train, [18] and, if the defendant railroad and its employees were free from fault in other respects, defendant is entitled to your verdict.

There is no statute of this State, nor any ordinance, which required that at the time of the accident here in question the railroad crossing be guarded by a human flagman or gates or other barriers or any wig-wag or other warning or protective device. Defendant railroad, however, if it elected to do so, was at liberty to voluntarily to maintain some such protection at the crossing. If it did so, it went beyond the requirements of any ordinance or statute.

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If the locomotive and care were operated toward the point of accident in the usual and customary way, proper warnings were sounded by its locomotive, a look-out was kept by the train crew and the operation was at a reasonable speed, regard being had for all the circumstances then existing, and if in so operating the railroad crew was using the care that ordinarily prudent men would have

used in the same circumstances, then the full duty to persons within the range of the railroad operations was performed by the railroad men in the handling of the railroad equipment, and if the defendant was free from negligence in other respects, your verdict must be in favor of the defendant.

If as the railroad train was being operated along the tracks and toward the crossing, a motor vehicle was driven toward the track and train, and if, until the vehicle was first seen by the train crew there was no negligence on their part, then, if, when they first saw it, it was so close to the train and was approaching the crossing in such manner that a collision seemed imminent, and the operators of the train were then, and without negligence on their part, confronted with a situation of imminent danger which demanded immediate action, they [20] were required in such circumstances to act only as reasonable men would act in such circumstances of sudden discovery of emergency and danger, and their conduct is not to be tested by what might have been done if there had been time for mature and considered deliberation.

If, as the train was operated toward the crossing where the accident happened, the firemen of the locomotive saw an automobile stop near the crossing, and if when he saw it the automobile was then in a place of safety and, by the exercise of reasonable care on the part of Ellis E. Shanahan in remaining at a stop could have remained clear of the train so that no accident would have occurred, then the mere fact that the automobile was so seen by

the firemen did not impose upon him any duty to warn the engineer or to take steps to slow or to check the speed of the train if the train itself, in view of the surrounding circumstances, was then in plain view and had its headlight burning and if, in such circumstances, the speed of the train was not then checked and no steps were taken to check its speed until the automobile was put in motion, that did not constitute negligence on the part of the defendant.

If as the train was approaching the automobile at which the accident happened and up to the point where the locomotive was so close to the crossing that it could not be stopped or its speed checked so as to avoid a collision the crossing was clear and there was no negligence on the part of the defendant; [21] and if, in such circumstances, an automobile stopped near the crossing was suddenly and unexpectedly driven on to the track and the engine-men then, for the first time, had noticed that an automobile would attempt to cross the track in front of the train and had such notice only after they were so close to the crossing that the locomotive could not be stopped or its speed checked so as to avoid a collision, and if then the enginemen exercised reasonable care to stop the locomotive or check its speed, no liability can be imputed to the defendant because its speed was not checked sooner, and if the defendant was free from negligence in other respects you will return your verdict in favor of the defendant.

If, as the train was operated toward the crossing

reasonable care was exercised in its operation and statutory requirements were obeyed, the locomotive headlight was burning and the locomotive and its headlight were in plain view of Ellis E. Shanahan, the operator of the automobile involved in the accident, then so long as the Shanahan automobile was in a place of safety there was no rule of law which called upon the enginemen to assume that the automobile would leave its place of safety and be driven to one of peril, but to the contrary, in such circumstances, if you so find, if the automobile was at a standstill then until it was started and approached so close to the track that it became apparent to a reasonable person that an accident might happen, the enginemen were entitled to [22] assume that the automobile would remain in a place of safety, clear of the track on which the train was operating and until put on notice to the contrary, they were entitled to act on that assumption even though there was no indication from Ellis E. Shanahan, the operator of the automobile, that he had actual knowledge of the approach of the train.

If there was no negligence in the operation of the train up until the time it could first become apparent to the enginemen operating the train that the automobile operated by the deceased Shanahan might attempt to cross the track in front of the train; and if, as soon as that became apparent, fireman immediately warned the engineer and the enginemen then exercised reasonable care in the handling of the train, no liability can be imputed to the defendant on account of the conduct of the

enginemen, and if the defendant was free from negligence in other respects, your verdict must be in favor of defendant Southern Pacific Company.

Ordinarily the burden of proof rests upon the defendant charging contributory negligence on the part of a plaintiff to prove by a preponderance of the evidence such contributory negligence, the exception being when the testimony offered by or on behalf of such plaintiff shows and establishes such contributory negligence. In other words, the burden of proof as to contributory negligence is met if the same is established by a preponderance of the evidence in the case, regardless of [23] whether such evidence was introduced by plaintiff, or by defendants, or by both.

Contributory negligence is such an act or omission of a person injured, amounting to want of ordinary care in the circumstances of the case as, concurring or cooperating with a negligent act of a defendant, was a proximate cause of the injury complained of. If, in this case, there was any want of care, no matter how slight, on the part of the deceased, Ellis E. Shanahan, amounting to negligence, and if such negligence in any degree proximately contributed to the injury and death of Ellis E. Shanahan, then it makes no difference whether the defendant was guilty of any negligent act or not, you can not compare the negligence of the parties, no recovery can be had, and it will be your duty to return a verdict in favor of defendant.

The deceased automobile driver, Ellis E. Shanahan, was under a continuing duty to exercise rea-

sonable care for his own safety at all times. There is nothing in any of the circumstances of this case which suspended that duty, relieved him of performing it, or excused a violation of it, if any. The defendant owed him no higher duty to look out for his safety than he owed to look out for his own safety, for the degree of care owed by both the automobile operator, Ellis E. Shanahan, and defendant was the same. If the deceased, Ellis E. Shanahan, failed to perform his duty, he was guilty of negligence. [24]

The law presumes that Ellis E. Shanahan, now deceased, in his conduct at the time of and immediately preceding the accident in question, was exercising ordinary care and was obeying the law. This presumption is a form of *prima facie* evidence and will support findings in accordance therewith in the absence of evidence to the contrary. Other evidence, if any, which the jury finds conflicts with such presumption must be weighed by the jury against the presumption, and any evidence which may support the presumption, to determine which, if either, preponderates. Such deliberations, of course, shall be related to and in accordance with the Court's instructions as to the burden of proof.

You are instructed that such a presumption cannot stand in the face of testimony which overcomes it. If the presumption has been overcome by testimony it passes out of the case. In addition, this presumption exists only in the absence of proof of the facts. If in this case you determine from the evidence what the facts and circumstances of this

accident were, and what the person injured actually did, then you must determine whether or not he exercised the care and vigilance for his own safety which the circumstances required, by a consideration of the facts as you find them, and without regard for any presumption that care was exercised. If you find the actual fact as to what the person who was injured did, there is no room for any presumption as to what he did or for any presumption that [25] he exercised care.

Even where there is no statute or ordinance on the subject, it is the rule in respect of the right of way at the railroad crossing that a vehicle or person approaching a steam railroad crossing, with the intention of going over the tracks, is under a duty to yield the right of way at that crossing to any railroad train which may be approaching the crossing. It is not the duty of the railroad train to stop and wait for the person or vehicle to cross, but, to the contrary, it is the duty of the traveler to stop and allow the train to pass if he cannot pass over ahead of it in safety.

You are instructed that a railroad track, the presence of which is known and which is known to be in use for the operation of railroad trains, is itself a warning of danger, without any other sign or signal or warning. It is a warning to persons who have reached years of discretion and who are possessed of ordinary intelligence that it is not safe to cross it without the exercise of constant vigilance, in order to be made aware of the approach of a train, and thus be enabled to avoid receiving injury.

Any person going toward and into a place where he knows there is danger of injury from moving railroad trains, is required to exercise greater vigilance and care than would be required of him in circumstances where danger from moving trains is not reasonably to be anticipated, and if he neglect [26] to exercise any of the vigilance which the situation, in all of these circumstances requires, he is guilty of negligence.

A railroad train which is approaching a crossing and as in plain view of any person intending to use that crossing either by reason of the fact that the train itself is in plain view or by reason of the fact that its headlight is in plain view, is itself a warning of danger to any person within the range of its movement, without any other sign or signal or warning of danger, and any failure to exercise ordinary care to heed that warning constitutes negligence.

If the deceased, Ellis E. Shanahan, in operating the automobile in which he was riding, violated any provision of the Motor Vehicle Code of this state, that constituted negligence on his part, and if there was such negligence which was a proximate cause of his death, your verdict must be in favor of defendant Southern Pacific Company.

If as the deceased, Ellis E. Shanahan, approached the crossing where this accident happened, or while he was in a position at a stop or where he could have stopped clear of the tracks a clearly visible electric or mechanical signal device was giving warning of the immediate approach of the railroad train, and if while such warning was being given he drove on to

the tracks in front of the approaching train and as a result was killed, your verdict must be in favor of defendant Southern Pacific Company. [27]

There has been some evidence in this case with respect to the visibility at the time and place of the accident with which we are now concerned. I instruct you that even if the visibility of the deceased, Ellis E. Shanahan, was impaired by natural conditions, the fact would not excuse any want of care on his part, but, to the contrary, when natural conditions of weather or otherwise impair the visibility of the operator of an automobile who intends to go over a railroad crossing he must exercise care and vigilance commensurate with that situation and must exercise greater care in the use of his other faculties of observation and caution and must exercise greater care in listening for any warning signals of the approach of a train. The care to be exercised by the operator of a motor vehicle in approaching and going over a railroad crossing is not independent of conditions of visibility but, to the contrary, the care and vigilance that he must exercise depends on conditions of visibility to the extent that if the visibility is impaired he must adjust his conduct accordingly and use ordinary care to adjust his conduct to the circumstance of impaired visibility to the end of avoiding collision with any train which may be approaching the crossing.

If the defendant had installed at the crossing where this accident happened an automatic signaling device designed to give warning of the approach

of trains, and if as the deceased approached and attempted to cross the track that signal was [28] not operating, that fact in and of itself is not ground for imposing liability on the defendant, nor would it excuse any negligence on the part of the deceased Shanahan. Even if there were such a signal, and even if it were not working, and the deceased saw that he could not blindly rely on that circumstance alone, and heedlessly and without taking any care for his own safety attempt to cross the track in front of an approaching train and if he did so he was guilty of negligence.

It was the duty of the deceased Shanahan to look and listen before attempting to cross the tracks and to give heed to any warning of the approach of the train, whether from a warning devise installed at the crossing or by whistle or bell of the train, or the headlights of the train, or the train itself, if the same were within the range of his observation; and it was his duty to exercise reasonable care to look and listen for the train, whether warnings of its approach were given or not; and if, before going into the path of the approaching train, whereby the exercise of ordinary care he should and could have learned of the approach of the train in time to avoid it by exercising ordinary care, but failed to do so and a collision resulted, he was guilty of negligence which was the proximate cause of his death and there can be no recovery.

This duty was a continuing duty and continued with the [29] deceased Shanahan as he approached the region of the tracks and as he approached each

track and until he was safely clear of all of the tracks, and if he failed to perform this duty he was guilty of negligence.

If deceased Shanahan was guilty of any want of ordinary care in operating his automobile, such want of care is not excused by any assumption which he might have made that the train would not be negligently operated or that it would be operated in any particular way, or as to speed or signals or otherwise. He was required to exercise reasonable care for his own safety at all times and independently and without regard for the manner of operation of the train, or for the giving or failure to give signals or warnings, if there was any such failure, and any assumption he might make with respect to the possible approach of the train or its operation could not excuse negligence on his part.

If, while the Shanahan automobile was in a place of safety, the deceased Shanahan, by looking and listening, could have learned of the approach of the train in time to have avoided the accident by exercising ordinary care, and in the exercise of ordinary care should have done so but did not, he was guilty of negligence.

Where there was a duty to look and listen for approaching trains it is not discharged by looking and listening at a time or place so removed from the actual crossing of the track [30] that it will not be reasonably effective if there were more available times and places, and where, as in the case of railroad operations, the risk is inherent in the continuing state of things, the duty to exercise reasonable

care is a continuing obligation and it cannot be discharged by looking and listening at a point removed in time and place from the crossing.

If the fixed physical facts of the railroad crossing and the established conditions, as you find them, as to the train and railroad operations, are such that before the accident and while the deceased Shanahan was in a place of safety, if he had looked and listened he must have learned the approach of the train in time to have avoided being struck by it by exercising ordinary care, then you cannot infer that he did use his faculties of observation and caution and did not learn of the approach of the train, and any presumption that he did so is overcome by the facts as you find them.

If, on the occasion of this accident, the windows of the Shanahan automobile were closed or were fogged so that their condition and position interfered with the exercise of the deceased's faculties of observation and caution, that fact, if it be a fact, did not excuse negligence, if any, upon the part of Shanahan, and it was his duty to exercise reasonable care and caution commensurate with all the circumstances and of reasonably to be anticipated dangers.

If his faculties of hearing were interfered with he was required to exercise greater [31] vigilance with his other faculties of observation, and if his sight were interfered with for any reason, he was required to exercise greater vigilance with his faculty of hearing to the end that the care exercised by him would be that of a reasonably prudent person in all the circumstances.

The defendant railroad in engaging in the rail-roading business and in operating the railroad was engaged in a legitimate and lawful business, and in considering the claims made by plaintiff and in suit here, you will bear in mind that the defendant railroad is entitled to the same consideration at your hands as any individual engaged in any other form of business.

In your consideration and determination of this case you must treat it as a litigation between persons of equal standing in the community. Your determination should not be affected in any way by reason of the fact that the defendant is a railroad or a corporation, nor should you be in any way influenced one way or the other by any thought or ideas you may have as to the financial standing of any party to this litigation. Such matters have no proper place in the consideration of a case of this kind. This case is to be considered and determined by you just as you would consider and determine any litigation between two private individuals.

If, as to whether or not defendant, Southern Pacific Company, or any of its employees, was negligent, or if, as to [32] the second necessary element of plaintiff's case, that is to say, whether or not there was any proximate casual connection between any claimed negligence on the part of the defendant and the accident, you find the evidence evenly balanced, and your own minds in equilibrium, and if, as to such issues, or either of them, you find that you cannot reasonably and fairly determine that the preponderance of the evidence is with the plaintiff,

and accordingly you find that your own minds are in doubt as to which way the preponderance of the evidence lies, then I instruct you, as a matter of law, that in such event plaintiff has failed to make out a case by the preponderance of the evidence which the law requires, you cannot impute liability to the defendant, and it will be your duty to return a verdict against the plaintiff and in favor of defendant.

In your consideration of this case, and in determining whether or not damages are to be given, you must not permit yourselves to be influenced in the slightest degree by any emotion or feeling of charity or sympathy. Such feelings and emotions, however proper in themselves, have no just place in the consideration by you of a case of this kind. In making your determination in this case, you cannot in any measure substitute prejudices or feelings or sympathies or passions for the evidence, as the basis of an award. Nor can you make a finding against the defendant based on mere guess, speculation or conjecture. You must make your determination only [33] upon a consideration of the evidence before you, and the instructions which have been given to you by the court. If, upon that evidence, and under the instructions of the court, you find no liability on the part of the defendant, you must return a verdict for the defendant.

You cannot make an award in favor of plaintiff unless you resolve the issue of claimed liability in favor of plaintiff. Unless, upon the whole case, the question of liability is so resolved, plaintiff is not entitled to an award of damages and you must re-

turn your verdict in favor of defendant Southern Pacific Company. If a case of liability has not been made out it is immaterial what other questions have been presented, or what other matters appear in the case, and you will not concern yourselves with them.

If you believe from the evidence, and from the instructions of the court that defendant is not guilty of the negligence charged, then you have no right to compromise the question of defendant's liability and award the plaintiff some amount merely because Ellis E. Shanahan was killed on the occasion in question. If you believe that the defendant was not negligent as charged in the complaint, then you will have no occasion to consider at all the question of damages. You must, if you so find, return a verdict against the plaintiff and in favor of the defendant.

If you find that the plaintiff's husband did, on the day [34] in question, come to his death as a result of injury proximately caused by the negligence of the defendant, then you are entitled to bring in a verdict in the plaintiff's favor, provided you find that the plaintiff's husband was not at fault which in any way contributed to the accident. If you decide that in favor of the plaintiff, then the next thing you are required to determine is to what, if any, damages plaintiff is entitled. In cases of this sort it is customary for the complaint to allege an amount of damages claimed. There are such allegations in this complaint. These allegations are merely the claim. They are not in any sense evidence or proof, and are not to be taken by you in any sense as evi-

dence or proof of what damages should be awarded, if you award any damages. If you award damages, the amount of damages you must resolve for yourselves, under the instructions which I have given you and which I will give you now, and upon the evidence which has been introduced.

I will now instruct you upon the measure of damages. You are not to assume from the fact you are instructed on the measure of damages, and the court by so instructing you does not intend to convey the idea to you, or to tell you, that you should award damages to the plaintiff in this case. You have been instructed on the measure of damages not because the court feels that the plaintiff in this case is entitled to damages, but because the court in cases such as this instructs [35] on all of the issues made by the pleadings, including the issue of damages.

If, under the court's instructions, you find that the plaintiff Nelda Shanahan is entitled to a verdict, you will award such sum as under all the circumstances of the case may be just compensation for the pecuniary loss she has suffered by reason of the death of her husband, Ellis E. Shanahan.

The testimony shows that at the time of the death of Ellis E. Shanahan he was 55 years of age, while the plaintiff, his wife, was 43 years of age. According to the United States Life Tables issued by the United States Department of Commerce, the expectancy life of a man aged 55 years is 18.34 years. The expectancy of life of a woman aged 43 years is 30.62 years. These facts of which the court takes

judicial notice are now in evidence to be considered by you in arriving at the amount of damages, if you find that the plaintiff is entitled to a verdict. However, the restricted significance of this evidence should be noted. Life expectancy shown by the mortality tables is merely an estimate of the probably average remaining length of life of all persons in our country of a given age, and that estimate is based on not a complete but only a limited record of experience. Therefore, the inference that may be drawn from the tables referred to this applies only to one who has the average health and exposure to danger of people of that age. Thus, in connection with this evidence, you [36] should consider all other evidence bearing on the same issue, such as that pertaining to the occupation, health, habits and activity of the persons whose life expectancies are in question.

In determining that pecuniary loss, if any, plaintiff Nelda Shanahan suffered by reason of the death of her husband, you may consider the financial support which plaintiff would have received from the deceased except for his death, together with pecuniary value of the society, comfort, care, protection and right to receive support, if any, which plaintiff lost by reason of her husband's death. In weighing these matters you may consider the age of the deceased and of the plaintiff; the state of health and the physical condition of the deceased and of the plaintiff as it existed at the time of the death and immediately prior thereto; their station in life; their

respective expectancies of life as shown by the evidence, the disposition of the deceased, whether it was kindly, affectionate, or otherwise; whether or not he showed an inclination to contribute to the support of the plaintiff in light of the earning capacity of the deceased; such other facts shown by the evidence as throw light upon the pecuniary value of the support, society, care, comfort and protection which the plaintiff reasonably might have expected to receive from the deceased had he lived.

In considering damages in a case of this character, you [37] are reminded that pecuniary loss is not based solely on the legal right to support, but may be based as well on a deprivation of benefits during the lifetime of deceased which, from all circumstances in evidence, it could be reasonably expected that the plaintiff would have received.

If you find that the plaintiff is entitled to recover and if you should find that she paid out any sum, or incurred liability for funeral services in memory of the deceased or for the burial of his body, you shall include in your award an amount that will compensate plaintiff for whatever reasonable expense was paid out or incurred by the plaintiff for those purposes.

The right of one person to receive support from another is not destroyed by the fact that the former does not need the support, and even if one or both of those conditions have existed, the mere right to receive support may have a pecuniary value and that may be the basis of assessing damages against

one who negligently has caused the death of the person from whom the support was due.

If you should return a verdict in favor of the plaintiff, but then in fixing the amount of recovery you must bear in mind that a defendant is just as much entitled to your consideration as is a plaintiff; that a defendant is entitled to protection at your hands against any unjust or unreasonable demand, and if you make an award in favor of the plaintiff it [38] will be your duty to see to it that such award does not exceed what the plaintiff is, in law and in fact, entitled to recover. I further instruct you that the burden of proof as to the amount of plaintiff's damage is upon the plaintiff, just as is the burden of proof of every other affirmative allegation of plaintiff's complaint.

If damages are awarded, the only amount which you can award is such as reasonably to compensate for the detriment suffered. If damages are awarded, they must not in any event exceed what is reasonable. They must not be enlarged so as to constitute either a gift or windfall to the plaintiff or punishment or penalty to the defendant. The only purpose of damages is to award reasonable compensation. There is no purpose here to inflict punishment or impose any penalty or to make an award for the sake of example.

If you should return a verdict for the plaintiff, then, in fixing the amount of your award, and in arriving at a pecuniary loss, if any, suffered, one of the elements is prospective loss of contributions

from the deceased, if any. If there is such loss, in making allowance for it, it will be improper to award the full principal amount of such prospective contributions—that is to say, it will be improper for you to attempt to arrive at this amount by multiplying the prospective yearly contributions by the number of years for which they would be enjoyed. To the contrary, if plaintiff is [39] entitled to anything for such loss, she would be entitled only to the present value of worth of such contributions.

In computing the present value or worth you must make adequate allowance for the earning power of money. In determining the present value the calculation must be made on the basis of the award bearing interest at the highest net rate of interest that can be had on money safely invested.

The present value or worth of a sum or sums to be received in the future is an amount of money such that the amount itself, if invested, at the highest net rate of interest that can be had on money safely invested, will, by resorting both to the principal sum and the income so calculated, produce the sum or sums that would have been received in the future at the time the same would be received and will do this not from the income alone but by use of both the income and the principal sum so that at the end of the period for which allowance is made, nothing will remain.

Where an action is brought on account of the death of a person, such action is solely for the purpose of compensating for the pecuniary loss, if any,

suffered by reason of the death. Accordingly, if you should return a verdict for the plaintiff, your award must be restricted to such an amount as will reasonably compensate for any pecuniary loss suffered, and for that alone, and the burden of proving pecuniary loss is upon the plaintiff. There can be no substantial recovery [40] on behalf of a person who has not suffered substantial pecuniary loss. The action is not for the loss of an object of love and affection, and the law does not recognize the loss of an object of love and affection as a ground for allowing damages, but we fix recovery to pecuniary and financial loss. Nothing can be allowed on account of any sentimental value which may have attached to the life which has been lost.

Your determination of this case, ladies and gentlemen, must be a judicial determination. In determining the question of liability you must not permit yourselves to be influenced, consciously or unconsciously, by the season of the year, the personal situation of the plaintiff, or sorrow which she may have been caused. You must not permit yourselves to be influenced in the slightest degree by any emotion or feeling of charity or sympathy. It is entirely natural to sympathize with and feel sorry for a woman who has lost her husband. Such feelings, in themselves, are entirely proper at the proper time and place, but such feelings have no just place in the consideration by you of this case. You must not in any measure substitute prejudice or feeling or sympathy for evidence as the basis of an award. Nor

can you make a finding against the defendant based on mere guess, speculation or conjecture or against the preponderance of the evidence. You must base your determination in this case solely upon the judicious consideration of the evidence and the instructions given to you by the Court. If [41] upon the evidence and under the assumption there is no liability on the part of the defendant railroad, your verdict must be for the defendant.

Now, ladies and gentlemen, if you can conscientiously do so you are expected to agree upon a verdict. You should freely consult with one another in the jury room. If any of you should be convinced that your view of the evidence is erroneous, do not be stubborn and do not hesitate to abandon your own view under such circumstances. On the other hand, it is entirely proper for you to adhere to your own view if, after a full exchange of ideas, you still believe you are right.

If you should find in favor of plaintiff in this case, you should not, in arriving at the amount of your verdict, resort to the so-called pooling plan or scheme. That scheme is for each juror to write down the amount he or she thinks should be awarded, then to add up the total and divide by twelve and thus fix the amount of the verdict. Your verdict should be based upon the evidence and not upon chance.

I finally caution you that if it becomes necessary for the Jury to communicate with the Court during its deliberations, or upon its return to the Court,

respecting any matter connected with the trial of this case, you should not indicate to the Court in any manner how the Jury stands numerically or otherwise on the issues involved. This caution the jurors should observe at all times after the case is submitted to it and [42] until the Jury has reached a verdict.

Whenever all of you agree to a verdict, it is the verdict of the Jury. In other words, your verdict must be unanimous. When you retire to the Jury room to deliberate, you will select one of your number as foreman or forelady and he or she will sign your verdict for you when it has been agreed upon, and he or she will represent you as your spokesman in the further conduct of this cause in this Court.

I have here two forms of verdict, and in presenting these forms to you, telling you what they are, I am not suggesting in any manner what your verdict shall be. The first form is the form that you should sign if you find in favor of the defendant. It has the title of the Court and cause and the word "verdict" on it, and says, "We, the Jury, find favor of the Defendant," and is signed by the foreman in case you find in favor of the defendant.

If you find in favor of the Plaintiff, then you should sign the other form which says, "We, the Jury, find in favor of the Plaintiff, assess damages against the Defendant in the sum of blank dollars." You should fill in the amount found, if you find any damages and find in favor of the Plaintiff, and then have that signed by your foreman.

Now, are there any exceptions?

Mr. Murman: Yes, your Honor.

The Court: Well, if there are going to be exceptions to the [43] instructions, I think I will allow the Jury to be taken out until we hear them.

Mr. Murman: I think I am entitled to make them in the presence of the Jury, your Honor.

The Court: What?

Mr. Murman: My understanding is that I am entitled to make the exception in the presence of the Jury when they bear on the instructions of the Court, to state my——

The Court: I think not. I think I will let the Jury go out, and then they will be recalled and I will give them the forms of verdict and submit it for their consideration.

Ladies and gentlemen, the attorneys in this case now want to make certain comments with respect to my instructions, so accordingly I would like to have you go to the Jury room until called back when I will finally submit the case to you.

(Thereupon the Jury left the courtroom, and the following proceedings were had outside the presence of the Jury.)

Mr. Murman: May the records show, your Honor, I except to the Court's refusal to permit me to make the exceptions in the presence of the Jury?

The Court: Yes, it will so show.

Mr. Murman: The first exception I wish to make, your Honor, is that I do not think I heard

your Honor instruct on direct and circumstantial evidence, which was one of the instructions that I requested to be given by the Court as from its usual instructions on that [44] subject. I may be in error on that, but I think I did not hear your Honor instruct on direct and circumstantial evidence, and I have reference, your Honor, in making that request, to B.A.J.I. instruction 27.

The second exception is to the giving of defendant's instruction number 43. That instruction I think would be proper if we were considering the case of a living plaintiff who had suffered personal injuries. However, as I understand the California law, and as the Court, in my opinion, properly, instructed the Jury when the Court gave plaintiff's proposed instruction number 8, that Mr. Shanahan in his conduct at the time and immediately preceding the accident in question was exercising ordinary care and was obeying the law is a presumption that does stand in the face of testimony which overcomes it. Your Honor has instructed to the contrary, that such presumption can not stand. There are cases from the Smellie case on down which hold such presumption is evidence and does stand, and hence that the Jury must consider it together with all other evidence in the case. If it is their opinion that the other evidence overcomes it, that is one thing, but to instruct that the presumption can not stand in face of testimony which overcomes it I submit is erroneous. The remaining passage in that if it has been overcome by testimony it passes out of the case,

that is not the holding of the Smellie case or subsequent cases.

This, also: "Presumption exists only in the absence of proof [45] of the facts." That is not a proper statement of the law, in my opinion.

In regard to the latter part of instruction number 43, where it is set forth that, "If in this case you determine from the evidence what the facts and circumstances of this accident were, and what the person injured actually did——." There is the crux of the cause. It isn't a question of a person being injured, it is the question of a person being killed—— "Then you must determine whether or not the exercised the care and vigilance for his own safety which the circumstances required, by a consideration of the facts as you find them, and without regard for any presumption that care was exercised." That is not correct. "If you find the actual fact as to what the person who was injured——" again we have the "injured" and not "killed" problem—— "There is no room for any presumption as to what he did or for any presumption that he exercised care."

In my judgment that instruction is clearly erroneous and contrary to law.

I take exception to your Honor's giving instruction number 49 in this respect, that there is no evidence in this case that the deceased violated any provision of the Motor Vehicle Law; no such evidence in the case at all. To give any instruction on that subject which would indicate that had there

been a violation and such would have been a proximate cause of his [46] death the verdict must be in favor of the defendant is erroneous.

Also, in Section No. 9 offered by the defendant, has no bearing on the issues in this case. There is no evidence as to what the duties of the deceased would have been had he crossed the track of a street railway, or approached the track of a street railway, and consequently there is no reason to have given that instruction, and to have indicated to the Jury that there may have been some different rule of conduct in connection with steam railroads, as we were only concerned with steam railroads there was no need for an instruction by the Court discussing street railroads.

I respectfully submit those exceptions to the Court.

The Court: I will agree that I didn't notice that I omitted the instruction with respect to circumstantial evidence, and I will give that when the Jury returns.

Mr. Murman: Yes, your Honor,

The Court: The other exceptions will be overruled.

Mr. Phelps: May it please the Court, your Honor understands that this is the part of the case which certainly I dislike most, but I want to state the defendant's position on the instructions, if your Honor please, first, as to the giving of certain of plaintiff's proposed instructions.

Contrary to what Mr. Murman would contend, it

had been our position in the case that the presumption of due care is dispelled as a matter of law, and to preserve that position, if [47] your Honor please, we respectfully except to the giving of Plaintiff's proposed instruction number 8, which would tell the Jury that the presumption was in the case, and the exception is on the ground that, as a matter of law, there is no room for any presumption that deceased exercised ordinary care.

Then, if your Honor please, we respectfully except to the giving of Plaintiff's proposed instruction number 4. First, that instruction, if your Honor please, "The maintenance by a railroad company of a signal at a railroad crossing is an invitation to a person approaching the crossing to rely——." As to the use of the word "invitation," if your Honor please, we submit, and on the ground except, that it is not an invitation; and at best, if your Honor please, it would be a question of fact whether or not it was an invitation, only that instruction in its form instructs as a matter of law that it is an invitation, and it doesn't even represent it as a question of fact. I appreciate that is an instruction drawn by plaintiff's counsel.

Next, in the same instruction, I note that the last sentence goes on to read that, "one who exercises ordinary care in giving attention to such a device, and who relies upon the operation of the same is not required to use the same amount of caution in looking and listening for an approaching train as is required when no method of warning * * *," and so

forth. That instruction is erroneous in this respect, in that if the [48] signal is working—it doesn't include that fact in the statement, but contrary to what the instruction says, a person approaching the crossing would be required to exercise more care rather than less. Finally, if your Honor please, in the same sentence of that instruction number 4, it uses the words, "when one does not exercise ordinary care in making use of the protective system that is provided." I submit that that is ambiguous and uncertain as to who the "one" is, and it could be and is misleading in that respect.

Now, we respectfully except to the giving of Plaintiff's instruction number 5 which states no proposition of law whatsoever, and which ignores the fact that deceased could be guilty of contributory negligence.

I respectfully except to the giving of Plaintiff's proposed instruction number 7, which had to do with a moment of unexpected emergency and which entirely eliminates the possibility of antecedent negligence on his part, couldn't apply, if your Honor please, if there were any antecedent negligence on the part of the deceased.

Then, if your Honor please, in Plaintiff's proposed instruction number 11 your Honor instructed the Jury with respect to the life expectancy of Mr. Shanahan. We submit that that was improper, that the only instruction in that regard should have been in the form of the stipulation heretofore had when that matter came up. [49]

On the question of damages, Plaintiff's proposed instruction number 13, to which we respectfully except, refers to benefits and states that damages can be awarded for deprivation of benefits without stating that they must be of pecuniary value only.

If your honor please, so much for the Plaintiff's instructions, except instruction number 12, which says that they may consider the inclination to contribute. I thought there, your Honor, it isn't an inclination to contribute, but the fact of contribution, that is important.

Then to the refusal to give defendant's proposed instructions number 25 and number 26 on the point, if your Honor please, of negative testimony. In this case I think that is particularly important in view of the fact that there was a direct issue as to whether or not the wigwag was out, and the Jury would have been told by those instructions the effect of that negative testimony.

Then, if your Honor please, our position with respect to speed was that, as a matter of law, the Jury should have been instructed it was not negligence as a matter of law. Your Honor gave other instructions, but I would like to except to the refusal to give Defendant's instruction number 29.

If your Honor please, Defendant's instruction number 46, that one dealing with absentmindedness and forgetfulness, I think in this case it is particularly apt because if plaintiff's [50] husband was day-dreaming and preoccupied, that would be one possible theory that the Jury might think that he was

preoccupied or absentminded and that that was one theory on which they might excuse his conduct. This would have told the Jury that that was not an excuse under the circumstances stated in the instructions.

Then, if your Honor please, again and only to preserve the point, with respect to the presumption we respectfully except to the refusal to give Defendant's Instruction number 55 dealing with presumption, and the citation I believe is correct and that is in the instruction.

Then finally, if your honor please, Defendant's instruction number 62, which, if your Honor please, would have told the Jury along the same line, that to the contrary that instead of there being a presumption of due care, if the facts were such as stated in the instruction, then there was presumption that he did not take due care.

And finally instruction 63 along the same line, and, if your Honor please, that one places and states the dilemma that I believe the cases support, that the deceased must have found himself in, that either he looked and did not see, or having looked did not look carefully, and that dilemma stated in that instruction is supported by the cases.

I respectfully except on those grounds.

The Court: I will also deny the motion of the defendant on [51] the various instructions. Will you bring the Jury back in? In the meantime, I am going to leave the bench and get an instruction on circumstantial evidence.

(Thereupon the Jury resumed their places in the jury box and the following proceedings were had.)

The Court: Ladies and gentlemen, my attention has been called to the fact that I failed to give you this instruction, which I should have; that is, an instruction with reference to direct and indirect evidence, and it is as follows:

Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly, without an inference or presumption, and which in itself, if proved, conclusively establishes the fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, although true, does not of itself conclusively establish the fact in issue, but which affords an inference or presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences. A presumption is a deduction which the law expressly directs to be made from particular **facts**, unless declared by law to be conclusive, it may be contraverted by other evidence, direct or indirect; but unless so contraverted the Jury is bound to find in accordance with the presumption.

An inference is a deduction which the reason of the Jury draws from the facts proved. It must be founded on a fact or [52]facts proved, and be such a deduction from those facts as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of

the person whose act is in question, the course of business or the course of nature.

That instruction, ladies and gentlemen, you are to consider together with all those that I have heretofore given you. I now ask you to go back to the Jury room and deliberate upon your verdict in this case.

(Thereupon the Jury retired to the Jury room.)

Mr. Phelps: May it please the Court, I think the record already reflects this, but I want to make sure that it does, that so far as the defendant Southern Pacific Company is concerned our position is that we should have liked and did request that the objections to the instructions be made out of the presence of the Jury. I have number 51 in mind, which provides objections shall be made out of the presence of the Jury.

The Court: The record will show that you asked that the objections to the instructions be given out of the presence of the Jury and that your request was granted.

Mr. Phelps: Thank you.

The Court: In opposition to Mr. Murman.

Mr. Phelps: Yes.

Certificate of Reporter attached.

[Endorsed]: Filed January 24, 1950. [53]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, or true and correct copies of orders entered on the minutes of this Court, in the above-entitled cause, and that they constitute the record on appeal herein, as designated by the appellant, to wit:

Complaint.

Answer to Complaint.

Demand For Trial By Jury.

Minute Order of July 18, 1949—Order Setting for Trial.

Minute Order of December 19, 1949—Trial, Jury Impaneled.

Minute Order of December 21, 1949—Further Trial.

Minute Order of December 22, 1949—Further Trial, Motion For Directed Verdict Denied.

Minute Order of December 27, 1949—Further Trial, Motion For Mistrial Denied.

Minute Order of December 28, 1949—Further Trial.

Minute Order of December 29, 1949—Further Trial, Motion For Directed Verdict Denied.

Verdict.

Minute Order of December 30, 1949—Further Trial, Verdict.

Judgment On Verdict.

Notice Of Judgment On Verdict.

Notice Of Motion For New Trial.

Motion For New Trial.

Minute Order of February 23, 1950—Motion For A New Trial Continued.

Minute Order of March 15, 1950—Hearing Of Plaintiff's Motion For A New Trial, Ordered Briefs Submitted, Motion Continued.

Minute Order of April 21, 1950—Plaintiff's Motion For A New Trial Submitted.

Minute Order of April 28, 1950—Plaintiff's Motion For A New Trial Denied.

Notice Of Denial Of Motion For New Trial.

Notice Of Appeal To United States Court of Appeals.

Cost Bond On Appeal.

Designation Of Record On Appeal.

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11.

Defendant's Exhibits Nos. A, B, C, D, E, F, G, H, I, J, K, L, M, N, O and P.

Reporter's Transcript (Partial) for December 19, 1949—Argument on Motion for Continuance.

Reporter's Transcripts—Vol I for December 21, 1949, Vol. II for December 22, 1949, Vol. III for December 27, 1949, Vol. IV for December 28, 1949, Vol. V for December 29, 1949.

Reporter's Transcript for December 30, 1949—Instructions To The Jury.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 27th day of June, A.D. 1950.

C. W. CALBREATH,
Clerk,

[Seal] /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed] No. 12593. United States Court of Appeals for the Ninth Circuit. Nelda Shanahan, Appellant vs. Southern Pacific Company, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed June 28, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
The Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12593

NELDA SHANAHAN,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion, et al.,

Respondents.

DESIGNATION OF NECESSARY RECORD
AND STATEMENT OF POINTS RELIED ON

Appellant hereby designates certain portions of the record as being necessary for the consideration of the following points relied on and concisely stated pursuant to rule 19(6) of the Court:

I.

In this wrongful death action arising out of a grade crossing accident, the trial court erred in instructing the jury on the presumption of ordinary care, clothing the deceased, as follows:

“You are instructed that such a presumption cannot stand in the face of testimony which overcomes it. If the presumption has been overcome by testimony it passes out of the case. In addition, this presumption exists only in the absence of proof of the facts. If in this case you determine from the evidence what the facts and circumstances of this accident were, and what the person injured actually

did, then you must determine whether or not he exercised the care and vigilance for his own safety which the circumstances required, by a consideration of the facts as you find them, and without regard for any presumption that care was exercised. If you find the actual fact as to what the person who was injured did, there is no room for any presumption as to what he did or for any presumption that he exercised care.”

II.

The trial court erred in giving repetitious formula instructions to the jury directing the jury to find against plaintiff or for defendant.

III.

The trial court erred in giving numerous repetitious and conflicting instructions to the jury regarding the rights of the parties as to the grade crossing in question.

IV.

The trial court erred in striking certain testimony of plaintiff's rebuttal witness Tolson and instructing the jury to disregard the testimony as neither rebuttal or impeachment.

V.

The trial court erred in denying plaintiff's motion for an order setting aside the verdict and judgment entered thereon and for a new trial specifically as to the following grounds:

1. Orders of the court by which plaintiff was prevented from having a fair trial.

2. Abuse of discretion by which plaintiff was prevented from having a fair trial.

3. Errors in law occurring at the trial and excepted to by the plaintiff.

4. Errors in the court's instructions.

5. Verdict for the defendant is contrary to law and against the evidence.

Appellant designates the following portions of the record as being necessary for the consideration of the above points:

1. Complaint.

2. Answer.

3. All testimony of witnesses produced on behalf of appellant as contained in the Reporter's Transcript.

4. The testimony of Witness Rowe produced on behalf of respondent.

5. All of the court's instructions to the jury.

6. Verdict of the jury rendered December 30, 1949.

7. Entry of judgment on verdict on January 3, 1950, together with notice thereof of even date.

8. Motion for new trial filed January 9, 1950.

9. Order of April 28, 1950, denying motion for new trial together with notice thereof dated May 1, 1950.

10. Notice of appeal to the United States Court of Appeals dated May 22, 1950.

11. Undertaking for Costs on Appeal.

Dated: July 3rd, 1950.

/s/ DAN HADSELL,

/s/ SYDNEY P. MURMAN,

HADSELL, SWEET, INGALLS
AND MURMAN,

Attorneys for Appellant.

Receipt of Copy Acknowledged.

[Endorsed]: Filed July 3, 1950.

No. 12,593

IN THE

United States Court of Appeals
For the Ninth Circuit

NELDA SHANAHAN,

Appellant,

VS.

SOUTHERN PACIFIC COMPANY

Appellee.

Appeal from the United States District Court, Northern
District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

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Attorneys for Appellant.

FILED

NOV - 6 1950

PAUL P. O'BRIEN,

CLERK

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No. 12,593

IN THE

**United States Court of Appeals
For the Ninth Circuit**

NELDA SHANAHAN,

Appellant,

VS.

SOUTHERN PACIFIC COMPANY

Appellee.

**Appeal from the United States District Court, Northern
District of California, Southern Division.**

APPELLANT'S OPENING BRIEF.

STATEMENT AS TO JURISDICTION.

This is a civil case commenced on April 6, 1949, in the United States District Court, Northern District of California, Southern Division, upon the filing by appellant, a citizen of California, of a complaint praying for damages in excess of \$3,000 because of the wrongful death of appellant's husband on December 27, 1948, against appellee, a Delaware corporation. Jurisdiction of the Court below was invoked under Section 1332(a) of the United States Code. Jurisdiction of this Court is invoked under Section 1291 of the United States Code.

STATEMENT OF THE CASE.

Generally, the insufficiency of the evidence is not at issue except as it may apply to certain instructions. Thus, with one exception to be considered later, the Court need only review appellant's evidence in chief to determine the points relied on by appellant (R. 573-575).

Although there were other prejudicial errors committed, appellant contends that reversible error unquestionably occurred when the Court, in the face of appellant's exception thereto (R. 561-562), erroneously instructed the jury as requested by appellee, that the statutory presumption that appellant's deceased husband was exercising ordinary care and obeying the law when appellee's train killed him, could "not stand in the face of testimony which overcomes it" and that "it passes out of the case" since "it exists only in the absence of proof of the facts" and "what the person *injured* actually did" which, when proved, require the jury to determine the question of negligence "without regard for any presumption that care was exercised" as "there is no room for any presumption" (R. 542-543).

As to the pertinent facts demonstrating the prejudicial error of this instruction, the record shows that appellant is a widow and has been a resident of Anderson, California, since 1923 (R. 177-178). On June 6, 1938, she married Mr. Shanahan with whom she lived up until the time he was killed by appellee's train two days after Christmas, 1948 (R. 178). At the time of his death, Mr. Shanahan was fifty-five

years of age, in apparent good health, and supporting appellant who was dependent upon him (R. 178). As a former justice of the peace he was a man of sober habits (R. 161-167). Early on the morning of the accident, Mr. Shanahan bid appellee goodbye to drive from Anderson to Redding, California, in the course of his official duties for the Government (R. 180). He was employed as a Zone Deputy Collector, Internal Revenue Service, United States Treasury Department, and had been for many years (R. 184). His gross earnings were in excess of \$4,000 per year (R. 176, 179).

The morning of the fatal accident was a cold, dark, misty morning described as "kind of stormy" (R. 31, 36, 57, 72, 98, 112, 148, 172). Windshield wipers and headlights were being used (R. 31, 57, 67, 113, 147). In the little town of Anderson, the main railroad crossing north towards Redding, with an unobstructed view of appellee's southbound trains, was blocked by appellee's freight train stopped on a siding there (R. 31, 53, 57, 114, 129). The next available crossing to the south was also blocked by the same freight train (R. 33, 58, 115, 130). The third, or Howard Street crossing, was clear (R. 34, 58-62, 116-121). However, there the wigwag crossing signal was not working (R. 34, 64, 81-83, 87-88, 92, 123, 158-159). There was no flagman at the crossing (R. 36, 71, 128, 173). In addition, visibility of appellee's south bound trains was obstructed by appellee's station and depot which had stood there for many years (Plaintiff's Exhibits 3-6; R. 70-71, 101, 158).

The record shows that Mr. Shanahan had stopped, looked and listened before attempting to cross appellee's tracks at the blind Howard Street crossing in his coupe (R. 60-62, 78-79, 103, 116-119, 131-137). He was killed instantly when appellee's train hit the coupe (R. 185). The train was a fifteen car passenger train running late, in excess of 60 miles per hour (R. 66, 101, 123, 190-191). After the impact the train finally stopped more than a quarter of a mile beyond the crossing (R. 66, 101, 124, 170-171). Besides killing Mr. Shanahan, the coupe was reduced to junk (R. 516).

There were two eyewitnesses to the accident. One, a Mr. Hewes who, as a farmer in the vicinity had not known either Mr. or Mrs. Shanahan before the accident, testified that he and his brother-in-law, Mr. DeRosa, drove into Anderson that dark, misty morning intending to use the North Street crossing which was blocked by appellee's freight train stopped on the siding (R. 55-57). Finding the next crossing to the south was also blocked by the freight train, Mr. Hewes approached the Howard Street crossing (R. 58). He observed Mr. Shanahan's coupe directly in front of him, also approaching the same crossing and he followed it, pulling up to within five feet behind it at the crossing where the coupe had already stopped (R. 60, 77-78). While stopped there for a minute or more, he could see Mr. Shanahan wiping the windshield on the inside with his hand (R. 61, 78-79, 103). The coupe's tail lights were burning (R. 67). As Mr. Shanahan started across appellee's tracks

slowly, Mr. Hewes followed (R. 62, 80, 100). No whistles, bells or noises of any kind were heard (R. 62, 80-81). Mr. Hewes testified, "I didn't hear a thing" (R. 63).

The red light of the wigwag crossing signal which Mr. Hewes had seen operating on other occasions, with its bell ringing and the red light shining, was not heard nor seen in the dark mist, although the lights behind it on the far side of the crossing were visible and tended to silhouette the crossing signal. In this connection, Mr. Hewes testified, in part, on direct examination (R. 64):

"Q. (by Mr. Murman). As you stopped here at R.H.-3, what, if anything, did you see in the general direction of R.H.-6 where you placed that?

A. Never seen anything except the lights across the street.

Q. Never saw anything except the lights across the street?

A. No, sir.

Q. But you were looking in that direction?

A. Yes, had to to cross."

On cross-examination, Mr. Hewes testified in part (R. 81-83):

"Q. Once again, whereas you say you didn't see a wig-wag signal working, you don't mean to testify that it wasn't working, but again you only did not see it?

A. It wasn't working, so far as I know, because if it was working I would have seen it.

Q. Will you answer my question?

Mr. Murman. That is an answer.

Mr. Phelps. May I go on, if your Honor please? I am not making any motion to strike.

The Court. Proceed.

Q. (by Mr. Phelps). Mr. Hewes, you have testified so far you didn't see it working, isn't that true? A. That is right.

Q. That is all you know about it?

A. That is right. It wasn't, so far as I know, it wasn't working. If it had been working I could have seen it from the position I was.

* * * * *

Q. (By Mr. Phelps). Is that the best answer you can give to my question, that you don't know whether it was working or not?

A. As far as I am concerned, it was not working. If it was, I would have seen it going back and forth.

Q. All right. Now then, as a matter of fact—withdraw that a moment. Let's go to another subject here. So far as the light or any wig-wag signal, covering that specifically, you say you didn't see a light or wig-wag signal, is that right?

A. That is right.

Q. I will ask you the same question so that it will be perfectly clear. As a matter of fact, that is all you know, you didn't see it, you don't know whether it was working or not, isn't that right?

A. If it was working, it should have had the red light on it, shouldn't it?

Q. Answer the question. So far as you know, you don't know whether the light was on or whether it was working.

A. It was not working."

About midway on the main track the coupe was hit by appellee's passenger train. Momentarily, before the collision, Mr. Hewes saw the headlight as it emerged from behind the station (R. 65, 101). No whistle was heard (R. 65). The train was going in excess of sixty miles per hour and cleared the crossing before it could stop (R. 66, 101). Mr. Shanahan's dead body was thrown clear of the coupe and fell on the ground about 120 feet south of the crossing (R. 67). The coupe was 20-30 feet from the body, a complete wreck (Plaintiff's Exhibit No. 7, R. 68).

The second eyewitness, Mr. DeRosa, testified that he accompanied Mr. Hewes that dark, misty morning and saw both crossings blocked by appellee's freight train (R. 112-115, 129-130). As they proceeded to the next available crossing to the south, they pulled up close behind Mr. Shanahan's coupe, following it to where it had stopped at the crossing (R. 116-117, 131-134). Both cars remained stopped at the crossing about a minute while the mist inside was wiped from the windshields (R. 118, 137). Mr. Shanahan was described by Mr. DeRosa as not seeming to be in any particular hurry in that "he took quite a bit of care" in wiping off the mist (R. 119). Mr. DeRosa noted that the coupe's tail lights were burning (R. 124). As the coupe moved forward onto the crossing, it went gradually at not over five miles per hour, being followed by the car in which Mr. DeRosa was riding (R. 120-121, 136-138).

Just as Mr. Shanahan's coupe got right across the main line, and while the car Mr. DeRosa was in was

moving along behind it, Mr. DeRosa for the first time saw the headlight of the oncoming train out of his side widow and then heard a whistle just "an instant" before the collision (R. 121-123, 138-142). No headlight beam had been seen before that (R. 154-157). No whistles had been heard before that (R. 144-145). The train was exceeding sixty miles per hour (R. 123). The wigwag crossing signal could not be seen in operation even though the mist didn't black out the lights on the far side of the crossing (R. 123, 151, 158-159). There was no flagman at the crossing (R. 128). After the impact, the train cleared the crossing before it could stop down the track from the crossing (R. 124). Mr. DeRosa noted that Mr. Shanahan's dead body was thrown about 120 feet, while his wrecked coupe, with its tail lights still burning, was 20-30 feet beyond the body (R. 125-126). He, like Mr. Hewes, had not known either Mr. or Mrs. Shanahan before the fatal accident (R. 125).

Upon proof of the foregoing, appellant rested and appellee's motion to dismiss was denied (R. 193, 198). After conflicting defense testimony and some rebuttal, the case was submitted to the jury following the court's instructions and certain exceptions thereto which were overruled. The verdict was for appellee (R. 8). Judgment was entered accordingly (R. 9). Appellant's motion to set aside the verdict and judgment and for new trial was denied (R. 11-13). This appeal followed (R. 14).

SPECIFICATION OF ERRORS.

The following specified errors are relied upon by appellants for a reversal:

1. In this wrongful death action arising out of a grade crossing accident, the Court erred to the prejudice of appellant in giving appellee's instruction to the jury on presumption of ordinary care as it applies to conflicting testimony where an injured person has testified in his own behalf, as follows (R. 542-543) :

“You are instructed that such a presumption cannot stand in the face of testimony which overcomes it. If the presumption has been overcome by testimony it passes out of the case. In addition, this presumption exists only in the absence of proof of the facts. If in this case you determine from the evidence what the facts and circumstances of this accident were, and what the person *injured* actually did, then you must determine whether or not he exercised the care and vigilance for his own safety which the circumstances required, by a consideration of the facts as you find them, and without regard for any presumption that care was exercised. If you find the actual fact as to what the person who was *injured* did, there is no room for any presumption as to what he did or for any presumption that he exercised care.” (Emphasis ours.)

Appellant excepted thereto as follows (R. 561-562) :

“The second exception is to the giving of defendant's instruction number 43. That instruction I think would be proper if we were considering the case of a living plaintiff who had suffered

personal injuries. However, as I understand the California law, and as the Court, in my opinion, properly, instructed the Jury when the Court gave plaintiff's proposed instruction number 8, that Mr. Shanahan in his conduct at the time and immediately preceding the accident in question was exercising ordinary care and was obeying the law is a presumption that does stand in the face of testimony which overcomes it. Your Honor has instructed to the contrary, that such presumption can not stand. There are cases from the Smellie case on down which hold such presumption is evidence and does stand, and hence that the Jury must consider it together with all other evidence in the case. If it is their opinion that the other evidence overcomes it, that is one thing, but to instruct that the presumption can not stand in face of testimony which overcomes it I submit is erroneous. The remaining passage in that if it has been overcome by testimony it passes out of the case, that is not the holding of the Smellie case or subsequent cases.

This, also: 'Presumption exists only in the absence of proof of the facts.' That is not a proper statement of the law, in my opinion.

In regard to the latter part of instruction number 43, where it is set forth that, 'If in this case you determine from the evidence what the facts and circumstances of this accident were, and what the person injured actually did . . .' There is the crux of the cause. It isn't a question of a person being injured, it is the question of a person being killed. . . . 'Then you must determine whether or not he exercised the care and vigilance for his own safety which the circum-

stances required, by a consideration of the facts as you find them, and without regard for any presumption that care was exercised.' That is not correct. 'If you find the actual fact as to what the person who was injured . . .' again we have the 'injured' and not 'killed' problem . . . 'There is no room for any presumption as to what he did or for any presumption that he exercised care.'

In my judgment that instruction is clearly erroneous and contrary to law."

2. The court erred to the prejudice of appellant in rejecting certain rebuttal testimony to which appellee's objections were sustained and which was ordered stricken at appellee's request as follows (R. 508-513):

"Q. Do you recall any occasion prior to the collision when the wig-wag signal did not operate?

Mr. Phelps. Objected to an incompetent, irrelevant and immaterial, and not proper rebuttal. It is part of your case in chief, and it has no bearing on the issues in this case. The evidence now is that the wig-wag had worked. There is no evidence at all—it was working on two occasions within an hour of the accident, and anything prior to that would be remote and has no bearing on the case. It is too late at this time.

Mr. Murman. Your Honor will recall Mr. Rowe, the signal man, testified he had been maintaining that signal for four years, and upon my cross-examination he very definitely said at no time during that four-year period, particularly

during the month preceding this accident, had that signal ever been out of order; that he had serviced it every day. I want to show by this witness that is not a fact.

Mr. Phelps. That would not establish any negligence. There was an objection to that question. I think it was overruled, but I don't think it is proper rebuttal and certainly is not admissible on the issue of negligence.

The Court. I think it is an attempt to impeach a witness on a collateral matter. Sustain the objection.

Mr. Murman. Does your Honor mean by that ruling that I can not ask this witness concerning the operation of that signal prior to the accident, as to the trapper operation, when the witness for the defense testified as he did? I am foreclosed from asking him on that subject?

The Court. What is the time? How remote it this?

Mr. Murman. Your Honor will recall, I believe, I asked Mr. Rowe whether or not it wasn't true that three or four months prior to the accident that signal had been out of operation for a whole working day, and he said it had never been out of operation at any time.

The Court. That is a collateral matter.

Mr. Phelps. It is a collateral matter.

Mr. Murman. No, it goes to knowledge on the part of the defendant that the signal was a signal that could not be relied on. Mr. Phelps made the point on his objections that momentary failure of a signal is not to bind the defendant, and he produced Mr. Rowe to prove the signal had never been out of operation before.

Mr. Murman. We had established our part of the case prior to that. This is rebuttal of Mr. Rowe's testimony. It is particularly as to that one witness who is the only one who testified on that subject.

Mr. Phelps. May it please the Court, I did not produce that. As I recall, it came out on cross-examination over my objection that it is a collateral matter and too remote and did not bear on the issues. I think your Honor is perfectly right, it would be collateral and couldn't have any purpose, couldn't serve any purpose at this time.

The Court. It deals with something four months before.

Mr. Murman. I am asking if I am precluded from any time prior to the accident, to bring that up.

The Court. The question addressed to Mr. Rowe, as I recall, was four months before.

Mr. Murman. Three or four, as he definitely said no, not at any time. I want to show by this witness that that is not the fact, and that is the purpose of it.

Mr. Phelps. Then I enlarge on the objection, if your Honor please, that as far as Rowe is concerned, it couldn't be impeachment of the witness Rowe at this time. There would be no foundation to show the witness Rowe knew about this incident which is alleged.

Mr. Murman. Yes, it would impeach him.

Mr. Phelps. It is still a collateral matter.

Mr. Murman. He said on every occasion he tested that, on every working day, and every occasion it was working properly, and counsel

made the point in his argument on the motion that if the Southern Pacific didn't have knowledge of the signal not being one that could be relied on, we haven't established negligence. He produced a witness that tends to indicate that is the fact. He did that on his case. This is rebuttal of that witness, and I submit it is proper. It is proper for the plaintiff to show that.

Mr. Phelps. Purely collateral issue.

Mr. Murman. It would be a purely collateral issue had counsel not established that point in his own testimony and absolutely stated the signal had never been out of order during the four years. I am not going back four years' time, but I would ask him specifically on the three or four months before that.

Mr. Phelps. If the Court please, he asked the question over my objection and he got an answer and now he wants to do this. It is too late.

The Court. I think I will sustain the objection.

Mr. Murman. Then I want to protect the record, and I will ask the other questions, and if counsel objects we will have to take the ruling.

Mr. Murman. Mr. Tolson, prior to the accident did you on any occasion notice that the signal stuck and remained in a position other than a vertical position after a train went by?

Mr. Phelps. Same objection, if your Honor please; it isn't proper rebuttal, wouldn't tend to impeach——

The Court. It isn't proper rebuttal. It really isn't proper rebuttal. You should have put it in at the beginning of your case, but I

will allow the question if it is directed to a point that is within a reasonable time.

Mr. Murman. All right.

The Court. A day or so before, or afterwards, maybe even a week.

Mr. Murman. All right, I will ask that question.

Q. Mr. Tolson, how long prior to the date of the accident do you last remember seeing the signal in a position other than a vertical position?

Mr. Phelps. Same objection, your Honor understands, runs to this line of questioning?

The Court. Yes.

Mr. Phelps. It wouldn't tend to impeach this witness, even remotely tend to impeach the witness. He was never asked about it. No notice on the part of the Southern Pacific Company.

A. Other than through his testing, that I would say, *it was within, oh, 30 days, anyway.* I have seen him when he was testing, it would hold in that position where it wasn't centered.

Mr. Phelps. I will ask that go out as too remote.

Q. (by Mr. Murman). When did the signal get that way?

A. When he was testing it.

Q. *You said within 30 days of the accident?*

A. *I would say something like that.* I don't remember the exact time or date, never paid particular attention to its position, but I have seen him take the signal and test it where it wouldn't be centered, and would stick to one side or the other and wouldn't come back.

Q. That was when he was testing it?

A. That was when he was testing it.

Mr. Phelps. May I please——

The Court. How long before the 27th day of December was this?

A. Well, directly, a direct day I couldn't answer that only just by saying *it was within 30 days, sir*, or something like that. It wasn't—it didn't come into my mind exclusively just what time that would be.

Mr. Phelps. Then, if your Honor please, I ask that the answer go out as too remote even under your Honor's ruling, confined within a day or two.

Mr. Murman. I submit it is rebuttal.

Mr. Phelps. It is not rebuttal.

The Court. I am going to strike the answer and instruct the jury to disregard the testimony. It isn't rebuttal and not impeachment.

Mr. Murman. Well, I beg to differ with your Honor, and under the circumstances I have no further questions." (Emphasis ours.)

3. The Court erred to the prejudice of appellant in repeatedly directing the jury in the course of certain formula instructions to find against appellant (plaintiff) or for appellee (defendant), as follows:

(a) "... it will be your duty to return your verdict in favor of defendants" (R. 523).

(b) "... your verdict must be in favor of defendant" (R. 526).

(c) "... then plaintiff is not entitled to recover anything and your verdict must be against the plaintiff and in favor of defendant" (R. 527).

(d) “. . . your verdict must be in favor of defendant” (R. 528).

(e) “. . . defendant is entitled to your verdict” (R. 536).

(f) “. . . your verdict must be in favor of the defendant” (R. 538).

(g) “. . . you will return your verdict in favor of defendant” (R. 539).

(h) “. . . your verdict must be in favor of defendant Southern Pacific Company” (R. 541).

(i) “. . . it will be your duty to return a verdict in favor of defendant” (R. 541).

(j) “. . . your verdict must be in favor of defendant Southern Pacific Company” (R. 544).

(k) “. . . your verdict must be in favor of defendant Southern Pacific Company” (R. 545).

(l) “. . . it will be your duty to return a verdict against the plaintiff and in favor of defendant” (R. 550).

(m) “. . . you must return a verdict for the defendant” (R. 550).

(n) “. . . you must return your verdict in favor of defendant Southern Pacific Company” (R. 551).

(o) “You must, if you so find, return a verdict against the plaintiff and in favor of the defendant” (R. 551).

(p) “. . . your verdict must be for the defendant” (R. 558).

4. The court erred to the prejudice of appellant in denying appellant's motion for an order setting aside the verdict and judgment entered thereon specifically as to the following grounds (R. 11-12, 574-575):

(a) Orders of the Court by which appellant was prevented from having a fair trial.

(b) Abuse of discretion by which appellant was prevented from having a fair trial.

(c) Errors in law occurring at the trial and excepted to by the appellant.

(d) Errors in the Court's instructions.

(e) Verdict for appellee is contrary to law and against the evidence.

SUMMARY OF ARGUMENT.

The above statement of the facts shows that had the Court permitted appellant to have been aided by the statutory presumption of ordinary care when the jury deliberated upon appellant's case, the jury unquestionably would have found that appellant had proved conclusively that her deceased husband, while in the course of his employment by the United States Treasury Department, carefully started in a lawful manner to cross appellee's tracks at Anderson, California, in the cold, misty darkness of the early morning two days after Christmas in 1948 and was killed by appellee's negligence while so doing. Appellee's passenger train was going through Anderson at the

time in excess of sixty miles per hour, making up lost time. No warnings were seen or heard until an instant before the fatal crash occurred. The main crossings in Anderson were blocked by appellee's freight train. The deceased's view of the speeding train, when he stopped to look and listen before proceeding over the tracks at the first available crossing was obstructed by appellee's station and depot. There was some conflict on whether the wig-wag crossing signal there was working. There was no flagman. In plain words, appellant's proof coupled with the presumption showed that appellee's negligence was obviously the proximate cause of deceased's death.

In view of the facts, prejudicial error was clearly committed when the Court instructed the jury in substance that the statutory presumption of ordinary care, clothing the deceased and corroborated by appellant's eyewitnesses, was out in the case of a "person injured" when "overcome by testimony" of "what the person injured did", and thus the jury was directed to reach their verdict without considering the presumption (*United States v. Fotopulos*, C.C.A. 9, decided March 6, 1950, 180 Fed. (2d) 630, 637, et seq.).

Additional prejudicial error was committed when the Court struck out appellant's contradictory evidence offered in rebuttal to establish the falsity of appellee's defense testimony that prior to the accident appellee lacked knowledge that the operation of the wigwag crossing signal was so faulty that it could

not be relied on by motorists forced by appellee's stalled freight train to proceed over the blind crossing which the deceased was forced to use at the time he was killed (*Greenleaf v. Pacific Tel. & Tel. Co.* (1919), 43 Cal. App. 691, 694).

Further prejudicial error was committed when the Court repeatedly directed the jury in its formula instructions to return a verdict for appellee (*Taha v. Finegold* (1947), 81 Cal. App. (2d) 536, 542; Supreme Court hearing denied, 547).

Lastly, the Court erred in refusing to set aside the verdict and judgment for appellee and in denying appellant's motion for new trial (*Southern Pacific Company v. Guthrie*, C.C.A. 9, decided December 30, 1949, 180 Fed. (2d) 295, 301).

I.

PREJUDICIAL ERROR WAS COMMITTED WHEN THE COURT INSTRUCTED THE JURY THAT THE PRESUMPTION OF ORDINARY CARE COULD NOT BE CONSIDERED IN THE FACE OF CONFLICTING TESTIMONY WHICH OVERCAME IT.

Obviously, the Court gave the jury conflicting instructions which were erroneous on the facts. One such erroneous instruction, requested by appellee and clearly prejudicial as to the presumption of ordinary care, stated the law applicable only to a living *injured* driver who has testified as to the facts of an accident after suing for damages for his injuries (R. 542-543). The text of the instruction in twice using the word "injured" clearly shows that (*McNulty v.*

Southern Pacific Co., 96 A.C.A. 956, 970—where the same language was used). However, the case at bar was not concerned with a living injured driver. It was brought by appellant, a widow, suing for damages because of the wrongful death of her husband whose lips as a witness in his own behalf were sealed for all time when appellee's speeding passenger train killed him outright. Since eyewitnesses produced by appellant corroborated the presumption that the deceased was proceeding across appellee's tracks carefully in a lawful manner, appellant was prejudiced and reversible error was committed when the jury was instructed at appellant's request that the presumption went out of the case when overcome by testimony conflicting with it (*United States v. Fotopoulos*, C.C.A. 9, decided March 7, 1950, 180 Fed. (2d) 631, 637, et seq.). The conflicting instructions on the subject of the presumption are as follows (R. 542-543):

“The law presumes that Ellis E. Shanahan, now deceased, in his conduct at the time of and immediately preceding the accident in question, was exercising ordinary care and was obeying the law. This presumption is a form of prima facie evidence and will support findings in accordance therewith in the absence of evidence to the contrary. Other evidence, if any, which the jury finds conflicts with such presumption must be weighed by the jury against the presumption, and any evidence which may support the presumption, to determine which, if either, preponderates. Such deliberations, of course, shall be related to and in accordance with the Court's instructions as to the burden of proof.

You are instructed that such a presumption cannot stand in the face of testimony which overcomes it. If the presumption has been overcome by testimony it passes out of the case. In addition, this presumption exists only in the absence of proof of the facts. If in this case you determine from the evidence what the facts and circumstances of this accident were, and what the person injured actually did, then you must determine whether or not he exercised the care and vigilance for his own safety which the circumstances required, by a consideration of the facts as you find them, and without regard for any presumption that care was exercised. If you find the actual fact as to what the person who was injured did, there is no room for any presumption as to what he did or for any presumption that he exercised care." (Emphasis ours.)

The last paragraph of the above quoted instructions was requested by appellee and it was as to that instruction that appellant took exception as a conflicting and erroneous statement of the law which is inapplicable on the facts of this case (R. 561-562). The Court overruled the exception (R. 563).

Preliminarily, it should be noted that any conflict between the paragraphs above quoted does not mitigate the reversible error committed in the giving of the last paragraph quoted. (*Wright v. Sniffin* (1947), 80 Cal. App. (2d) 358, 363; Supreme Court hearing denied, 366.) In *Lowe v. Lee* (1950), 95 Cal. App. (2d) 685, the District Court of Appeal of California held that the giving of an erroneous instruction is not cured because a correct instruction on the same sub-

ject is given where the effect is simply to produce a clear conflict in the instructions so that it is not possible to know which instruction was followed by the jury in reaching a verdict. In that case the Court quoted from a previous decision on the same subject, and stated at page 690:

“In *Akers v. Cowan*, 26 Cal. App. (2d) 694, 699 (80 P. (2d) 143), the Court said: ‘It has been frequently held that the giving of an erroneous instruction is not cured by the giving of other correct instructions, where the effect is simply to produce a clear conflict in the instructions and it is not possible to know which instruction was followed by the jury in arriving at a verdict.’”

That being the law, it is appellant’s contention that the prejudicial error contained in the instruction requested by appellee as to the presumption in question must be considered by this Court.

A.

United States v. Fotopulos is controlling and requires a reversal.

In *United States v. Fotopulos*, decided March 7, 1950, 180 Fed. (2d) 631, this Court was confronted with similar facts in connection with the statutory presumption in question as contained in Section 1963, California Code of Civil Procedure, Sub-section 4 thereof. In that case the deceased had been killed and his widow was suing for damages for wrongful death. On appeal, the question of the findings as to negligence and contributory negligence prompted a

review of applicable California law. Among other things, this Court said at page 637:

“The presumption that a person looks out for his own safety comes to the aid of the plaintiff. See 31 C.J.S., Evidence, Sec. 135. This presumption thus rises to the dignity of evidence when, either because of the injuries suffered or because of death, the plaintiff cannot testify. *Westberg v. Willde*, 1939, 14 Cal. (2d) 360, 364-365, 94 P. (2d) 590; *Douglas v. Hoff*, 1947, 82 Cal. App. (2d) 82, 85, 185 P. (2d) 607. It creates a conflict with any evidence to the contrary. *McKinley v. Southern Pacific Co.*, 1947, 80 Cal. App. (2d) 301, 313-314, 181 P. (2d) 899. And it is sufficient to support the verdict of a jury or the finding of a Court *unless overcome by irrefutable evidence*. The Supreme Court of California in *Mar Shee v. Maryland Assur. Corp.*, 1922, 190 Cal. 1, 9, 210 P. 269, 273, laid down this rule for determining whether evidence is of a character to overcome the presumption: ‘. . . a fact is proved as against a party when it is established by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that, when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case.’

And see, *Anthony v. Hobbie*, 1945, 25 Cal. (2d) 814, 819-820, 155 P. (2d) 826; *McKinley v. Southern Pacific Co.*, supra.

This Court, in a case arising under the Federal Tort Claims Act, has taken the same attitude.”

In the case at bar, the trial Court refused to recognize the presumption as arising to the dignity of evidence and so told the jury. Also, the trial Court did not regard the presumption as creating a conflict with any evidence to the contrary, and so instructed the jury. The presumption here had not been overcome by “irrefutable evidence”. In the *Fotopulos* case this Court went on to say at page 638:

“The theory of these cases is that, unless the act or omission unequivocally establishes contributory negligence and causal connection with the accident, the question is one for the jury. As stated pithily in *Wright v. Sniffin*, supra, 80 Cal. App. (2d) at pages 362-363, 181 P. (2d) at page 677: ‘The questions of negligence and of contributory negligence, and as to whether such conduct or omissions contributed to or are *the cause of the accident* resulting in injuries or damage, are ordinarily problems for the determination of the jury.’ (Emphasis added.)”

Appellant concedes appellee presented some testimony which by inference at best conflicted with the presumption. (R. 198-491.) However, this was far short of “irrefutable evidence” to say nothing of the instruction that testimony, overcoming the presumption, precluded the jury from further consideration of the presumption in reaching their verdict. The reconciliation of the conflict between the presumption and appellee’s testimony was still a jury question, particularly since the Court had instructed on both negligence and contributory negligence.

B.

The instructions as a whole emphasize the prejudicial error committed.

Viewed in the light of all the instructions, it is all the more obvious that prejudicial error was committed in giving appellee's instruction as to the inapplicability of the presumption of ordinary care and lawful conduct to "the person injured". Section 1963 of the California Code of Civil Procedure provides the following disputable presumptions: "That a person takes ordinary care of his own concerns" (Subsection 4), and "That the law has been obeyed" (Subsection 33). These stand unless overcome by irrefutable evidence (*United States v. Fotopulos*, decided March 7, 1950, 180 Fed. (2d) 631, 637).

The fact that the jury was erroneously instructed that the statutory presumptions could not stand in the face of testimony which overcomes them, was emphasized by the fact that the Court also instructed the jury that in the absence of proof you must take it that appellee was not negligent (R. 527); that the jury could not return a verdict against the Southern Pacific Company merely because an accident happened and death resulted from it (R. 528); that in carrying the burden of proof, appellant is not aided or assisted by any presumption or inference arising from the mere fact of accident and death (R. 528); that appellee's employees were entitled to presume and assume that the deceased would hear and see that which was in the range of his sight and hearing and that he would not attempt to cross the track

where a collision could be avoided by the exercise of reasonable care and the performance of lawful duties (R. 533-534); that it makes no difference whether appellee was guilty of any negligence or not if there was contributory negligence (none was shown) on the part of the deceased, no matter how slight, proximately contributing to his death (R. 541); that appellee owed the deceased no higher duty to look out for his safety than the deceased owed to look out for his own safety (R. 542); that violations of the California Motor Vehicle Code (none were shown and an exception was taken—R. 562) constituted negligence on the part of the deceased (R. 544); that any presumption that the deceased used his faculties of observation and caution is to be overcome by the facts as found by the jury (R. 548); and that appellant is only entitled to recover if the jury determines that the preponderance of the evidence is with the appellant (R. 549).

Appellant contends that by instructing the jury as in the foregoing and also by instructing the jury that, where the presumption of ordinary care has been overcome by testimony, the jury had to determine its verdict without regard to the presumption, made the reversible error committed all the more obvious and prejudicial.

C.

The authorities hold the instruction is prejudicially erroneous.

The California cases hold that the instruction is prejudicially erroneous. In support of appellee's re-

requested instruction on the presumption as given by the Court, three cases were cited to the Court below by appellee which clearly show that the instruction was not intended to apply to a wrongful death action. The first, *Rogers v. Interstate Transit Co.*, decided in 1931, 212 Cal. 36, involved a living plaintiff. The trial court instructed:

“the law presumes that the plaintiff at the time in question here took ordinary care of his own concerns.”

This was objected to on appeal, and in commenting thereon the Court stated at page 38:

“At the trial of this action *plaintiff not only testified* as to the circumstances of the collision . . . but he produced witnesses who gave evidence . . . Whether plaintiff took ordinary care . . . was a matter of evidence established by the plaintiff and witnesses . . . In the face of this evidence there was no room for any presumption.”

Another case, *Ariasi v. Orient Insurance Company*, C.C.A. 9, decided in 1931, 50 Fed. (2d) 548, also involved a living plaintiff. Ariasi had a wine-making permit revoked by Government officials for alleged illegal activities. It was contended that the cancellation of the wine permit was a presumption of his unlawful acts. The Court held at page 552 that the so-called presumption was not evidence to be weighed against Ariasi's positive evidence denying that he engaged in illegal acts. In reaching this conclusion, the Court ruled that the California law, as set forth in

Smellie v. Southern Pacific Co., 212 Cal. 540, was not controlling in the Federal Courts. However, *Erie R. Co. v. Tompkins*, 304 U.S. 64, changed that rule. Thus, the *Ariasi* case, as matters now stand, merely announces that the *Smellie* case is the rule in California.

A third case, *Los Angeles Traction Co. v. Conasey*, C.C.A. 9, decided in 1905, 136 Fed. 104, involved a decedent who drove his car in front of a street car. The Court instructed that the deceased was presumed to have stopped, looked and listened before crossing the track. This instruction was held erroneous on appeal. Again, since the case is a very old one, it is submitted that because of the rule in *Erie R. Co. v. Tompkins*, supra, a different conclusion would be reached at the present time in the application of the California law as we shall point out.

A leading case in California on this subject is *Westberg v. Willde* (1939), 14 Cal. (2d) 360, where the Court accepted as correct an instruction quoted at page 364:

“The presumption is that every man obeys the law, and the presumption in this case is that the plaintiff’s son, Morris E. Westberg, was traveling at a lawful rate of speed, and on the proper side of the highway at all times. *This presumption is in itself a species of evidence, and it shall prevail and control your deliberations until, and unless it is overcome by satisfactory evidence.*”

In the instruction requested by appellant in the Court below and as given by the Court, the jury was

told, "If the presumption has been overcome by *testimony* it passes out of the case". From the above quotation in the *Westberg* case we can see that the jury was expressly instructed, "that the presumption shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence". We take this to mean that the jury had to consider the presumption and deliberate upon it with all the other evidence in the case. Regardless of what the testimony might have been, the Court went on in the *Westberg* case to state at page 365:

"In the case of *Mar Shee v. Maryland Assur. Corp.*, supra, this Court had before it the question as to whether the presumption in favor of one of the parties to said action had been 'overcome by satisfactory evidence'. In that case the rule was announced that 'a fact is proved as against a party when it is established by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case'."

The reference by the Court to the *Mar Shee* case is one frequently made in the California cases, when passing upon the problem of a proper instruction on the presumption in question, and, as such, is regarded as a leading case. Again in the *Westberg* case the Court went on to say at page 367:

"But in the other situation, where the acts and conduct of a deceased person are the subject

of inquiry, and the testimony respecting such acts and conduct necessarily must be produced by witnesses other than the deceased, unless such testimony meets the requirements of the rule in the *Mar Shee* case, and other cases decided by this Court following the *Mar Shee* case, an instruction that the deceased is presumed to have exercised ordinary care for his own concerns is not only proper but this Court, in an unbroken line of decisions, has sustained the giving of such an instruction. (*Ellison v. Lang Transp. Co.*, *supra.*)”

The case of *Scott v. Sheedy* (1940), 39 Cal. App. (2d) 96 (Supreme Court hearing denied, 105), touches upon the problem here. There the controverted instruction is quoted at page 99:

“The Court instructed the jury as follows: ‘The presumption is that every man takes ordinary care of his own concerns, and the presumption in this case is that the plaintiff exercised ordinary care and diligence from all the circumstances of the case—his character and habits and natural instinct of self-preservation. This presumption is in itself a species of evidence, and it shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence’.”

The appellant (defendant) attacked the instruction, and in this connection the Court stated at page 99:

“*Similar instructions have been the pivotal point or crucial factor in the determination of the merits of many appeals, and while the position of appellants finds support in decisions here-*

tofore rendered by this and other appellate courts, the point at issue seems to have been decided by the Supreme Court adversely to appellants' position in the recent case of *Westberg v. Willde*, 14 Cal. (2d) 360 (94 Pac. (2d) 590), and as an intermediate appellate court we are bound by the holding therein." (Emphasis ours.)

Incidentally, the *Scott* case did not involve a death but rather a person who suffered a brain injury and had no memory concerning the accident. In such a situation the rule is the same, and the following quotation at page 102 is significant:

"The evidence from which a conclusion of contributory negligence on the part of plaintiff might be drawn was produced by witnesses called on his behalf. There was some difference in the testimony as to the number of signals given, and a slight variation as to the position occupied by plaintiff at the time of the accident. Some of the witnesses noted the direction in which plaintiff turned his head. When considered as a whole, we cannot conclude as a matter of law that contributory negligence was or was not established by the uncontradicted testimony of the witnesses, or that the facts proven were wholly irreconcilable with the disputable presumption given in the Court's instructions. (*Mar Shee v. Maryland Assur. Corp.*, supra; *Westberg v. Willde*, supra.)"

Appellant contends that the above quotation would certainly indicate the error in the third sentence of

the instruction given by the Court on the presumption in question when the Court stated, "In addition, this presumption exists only in the absence of proof of facts". Thus, in *Hoppe v. Bradshaw*, (1941), 42 Cal. App. (2d) 334, (Supreme Court hearing denied, 345), the Court said at page 345:

"We therefore conclude that appellant was entitled to the benefit of the presumption here claimed until dispelled by evidence opposed to it. It is true that Bradshaw's testimony created a conflict in certain particulars and the testimony of other witnesses to certain facts differed in some respects. It will be remembered that one witness for appellant testified that Bradshaw stated that he did not see appellant 'until he was right on him'. Assuming the truth of this statement, then Bradshaw's testimony that appellant failed to look as he stepped from behind the parked car was, at least, open to question. Bradshaw's testimony, though evidence in the case which the jury might have considered, did not of itself destroy the probative weight of the fact presumed. The question whether his testimony proved facts sufficient to overcome the presumption was one for the jury. (*Whicker v. Crescent Auto Co.*, Supra, p. 242.)"

In *Anthony v. Hobbie*, (1945), 25 Cal. (2d) 814, the Court said at page 819:

"The plaintiffs are entitled to the aid of the presumption that decedent used due care for his own concerns. (Code Civ. Proc., Sec. 1963(4).) The case was a proper one for the application of that presumption. (*Westberg v. Willde*, 14 Cal.

(2d) 360 (94 P. (2d) 590).) That such presumption was not dispelled from the case is obvious from the foregoing discussion showing that plaintiffs' own evidence did not show decedent was guilty of contributory negligence as a matter of law. *Certainly if he was not guilty of contributory negligence as a matter of law, there is no evidence completely refuting the presumption that he was not.*" (Emphasis ours.)

In *Eastman v. A. T. & S. F. Ry. Co.*, (1942), 51 Cal. App. (2d) 653, (Supreme Court hearing denied, 667), the Court said at page 665:

"To this may be added the application of the principle that where death has resulted from the accident and the lips of the injured party are thus sealed, it will be presumed, in the absence of evidence to the contrary, that the deceased exercised ordinary care for his own safety. (*Robbins v. Southern Pacific Co.*, supra, citing *Larrabee v. Western Pac. R. R. Co.*, 173 Cal. 743 (161 Pac. 750).) This presumption is evidence in the case, and is to be so considered, unless it is overcome by satisfactory evidence, that is, unless the evidence of the party in whose favor the presumption is sought to be invoked is in conflict therewith (*Smellie v. Southern Pacific Co.*, 212 Cal. 540 (299 Pac. 529)); where it is not so controverted, it merely raises a conflict with the opposing evidence, and the jury is warranted in finding in accordance with the presumption (*Westberg v. Willde*, 14 Cal. (2d) 360 (94 Pac. (2d) 590), citing numerous cases; *Smellie v. Southern Pacific Co.*, supra)."

In *Wahrenbrock v. Los Angeles Transit Lines*, (1948), 84 Cal. App. (2d) 236, (Supreme Court hearing denied, 243), the Court said at page 241:

“The evidence introduced by the plaintiffs in the present case is not ‘wholly irreconcilable’ with the presumption that every person obeys the law, that a person is innocent of wrong, and that the decedent exercised due care for his own safety. *There is no evidence that the decedent did not look and listen. It is presumed that he did and that he, at all times, exercised the requisite degree and amount of care for his own safety by looking in the direction from which danger could be anticipated. Whether he did or not, was a question for the jury.* The situation is the same as if he were alive and had testified that he did and did not do all things which a reasonable prudent person would have done or would not have done under like circumstances. The deceased was upon a public highway, a place where he was lawfully entitled to be, and he was about to cross defendants’ right of way upon a public highway traversing the right of way.” (Emphasis ours.)

In *Connors v. Southern Pacific Co.*, (1949), 91 Cal. App. (2d) 872, (Supreme Court hearing denied, 880), the Court said at page 879:

“We are of the opinion the plaintiffs were entitled to rely upon the presumption created by section 1963, subdivision 4, of the Code of Civil Procedure, that the deceased took due care of his own safety in operating the truck at the time of the accident, to be weighed by the jury under the circumstances of this case. (*Smellie v. Southern Pacific Co.*, 212 Cal. 540, 552 (299 P. (2d)

590).) We may not say that the presumption was dispelled by the evidence which was adduced by plaintiffs, as a matter of law. There is evidence in this case that the deceased was traveling downgrade with a heavy load; that he was in control of his brakes which were in good condition, and that his headlights and spotlights were burning brightly. *The inference is that he had no knowledge of the presence of the freight train, or even that there was a spur track at the bottom of the grade.* We find no evidence which would dispel the presumption or render him guilty of contributory negligence as a matter of law.”

“The judgment of nonsuit is reversed.” (Emphasis ours.)

In *Karstensen v. Western Transportation Co.*, (1949), 93 Cal. App. (2d) 435, the Court said at page 438:

“Additionally plaintiffs are entitled to the presumption that decedent exercised due care unless such presumption is dispelled by the testimony of plaintiffs’ own witnesses showing as a matter of law that decedent was contributorily negligent. (*Anthony v. Hobbie*, 25 Cal. (2d) 814 (155 P. (2d) 826).)”

In *Milani v. Southern Pacific Co.*, (1949), 93 Cal. App. (2d) 527, (Supreme Court hearing denied, 532), the Court said at page 530:

“Furthermore, plaintiff was entitled to the benefit of the presumption that the decedent took ordinary care of his own concerns (Code Civ. Proc. Sec. 1963, subd. 4), for, as said by our

Supreme Court in *Westberg v. Willde*, 14 Cal. (2d) 360, at page 367 (94 P. (2d) 590):

‘But in the other situation, where the acts and conduct of a deceased person are the subject of inquiry, and the testimony respecting such acts and conduct necessarily must be produced by witnesses other than the deceased, unless such testimony meets the requirement of the rule in the Mar Shee case, and other cases decided by this Court following the Mar Shee case, *an instruction that the deceased is presumed to have exercised ordinary care for his own concerns is not only proper but this court in an unbroken line of decisions, has sustained the giving of such an instruction*’.” (Emphasis ours.)

In the most recent case which has come to appellant’s attention, *Ringo v. Johnson*, (1950), 99 A.C.A. 153, the Court said at page 158:

“There are many cases holding that the presumption of due care may be weighed against other evidence where the plaintiff is dead and hence cannot testify. (*Smellie v. Southern Pac. Co.*, 212 Cal. 540 (299 P. 529); *Westberg v. Willde*, 14 Cal. (2d) 360 (94 P. (2d) 590).)

We have been able to find no case, nor have we been cited to one, which holds that a plaintiff is entitled to the benefit of the presumption of due care where his own testimony is directly contradictory to it. The presumption may be invoked by a party when ‘his evidence is not inconsistent therewith.’ (*Smellie v. Southern Pac. Co.*, supra, p. 555.) *The presumption gives rise to a conflict in the evidence* ‘unless the presumption on the one hand is irreconcilable with the

evidence on the other hand' said the Court in *Mar Shee v. Maryland Assurance Corp.*, 190 Cal. 1, at page 9 (210 P. 269)." (Emphasis ours.)

Thus, we see from the foregoing authorities that at no time does the presumption, that the deceased proceeded across appellee's tracks carefully and in a lawful manner, pass out of the case merely because of testimony produced by appellee which may have been considered to have conflicted with it. The presumption has the dignity of evidence and thus creates a conflict with any evidence to the contrary. Furthermore, it is sufficient to support the verdict of a jury unless overcome by irrefutable evidence. Appellant contends that the foregoing authorities clearly demonstrate the reversible error in the Court's instruction on this subject. Consequently, it is submitted that, apart from other prejudicial error committed, appellant should be granted a new trial (*White v. Los Angeles Ry. Corp.*, (1946), 73 Cal. App. (2d) 720, 727, citing *Wiswell v. Skinners*, (1941), 47 Cal. App. (2d) 156, 160, Supreme Court hearing denied, 163).

II.

PREJUDICIAL ERROR WAS COMMITTED WHEN THE COURT REJECTED AND STRUCK OUT APPELLANT'S REBUTTAL TESTIMONY CONTRADICTING APPELLEE'S WITNESS AS TO THE OPERATION OF THE WIGWAG CROSSING SIGNAL.

In appellant's case in chief, appellant proved that on the particular dark, misty morning in question, appellee's wigwag crossing signal was not working and,

in addition, no flagman was seen at the blind crossing where appellant's husband was killed by appellee's speeding passenger train (R. 34, 36, 64, 71, 81-83, 87-88, 92, 123, 128, 158-159). In defense, appellee produced Mr. Rowe, the railroad's wigwag crossing signal maintenance man, who testified that he had been so employed in the area of Anderson for about four years prior to the accident (R. 272). He described the wigwag in question as having a bell and a light to attract the attention of crossing motorists (R. 272). He testified that he had inspected the wigwag on every working day (R. 277) and that he had never found the wigwag out of order (R. 288). During the entire four years he worked in the Anderson District, the wigwag had not required repairs and no reports of it being out of order had been made (R. 289). At no time, and even within three or four months of the accident, could he recall the signal being out of order although it was tested every working day (R. 294).

In rebuttal, appellant produced Mr. Tolson, a disinterested witness, who worked in a service station at Anderson within one hundred feet of the wigwag crossing signal in question (R. 504-506). He testified that he remembered the dark, misty morning of the accident and that just prior thereto he had not heard the bell of the wigwag although he heard the ensuing crash (R. 505-508.) Mr. Tolson testified that he had worked at the service station for two years prior to the accident (R. 508). The following then ensued (R. 508-513):

“Q. Do you recall any occasion prior to the collision when the wig-wag signal did not operate?

Mr. Phelps. Objected to as incompetent, irrelevant and immaterial, and not proper rebuttal. It is part of your case in chief, and it has no bearing on the issues in this case. The evidence now is that the wig-wag had worked. There is no evidence at all—it was working on two occasions within an hour of the accident, and anything prior to that would be remote and has no bearing on the case. It is too late at this time.

Mr. Murman. Your Honor will recall Mr. Rowe, the signal man, testified he had been maintaining that signal for four years, and upon my cross-examination he very definitely said at no time during that four-year period, particularly during the month preceding this accident, had that signal ever been out of order; that he had serviced it every day. I want to show by this witness that is not a fact.

Mr. Phelps. That would not establish any negligence. There was an objection to that question. I think it was overruled, but I don't think it is proper rebuttal and certainly is not admissible on the issue of negligence.

The Court. *I think it is an attempt to impeach a witness on a collateral matter. Sustain the objection.*

Mr. Murman. Does your Honor mean by that ruling that I can not ask this witness concerning the operation of that signal prior to the accident, as to the trapper operation, when the witness for the defense testified as he did? I am foreclosed from asking him on that subject?

The Court. What is the time? How remote is this?

Mr. Murman. Your Honor will recall, I believe, I asked Mr. Rowe whether or not it wasn't true that three or four months prior to the accident that signal had been out of operation for a whole working day, and he said it had never been out of operation at any time.

The Court. That is a collateral matter.

Mr. Phelps. It is a collateral matter.

Mr. Murman. No, it goes to knowledge on the part of the defendant that the signal was a signal that could not be relied on. Mr. Phelps made the point on his objections that momentary failure of a signal is not to bind the defendant, and he produced Mr. Rowe to prove the signal had never been out of operation before.

Mr. Murman. We had established our part of the case prior to that. This is rebuttal of Mr. Rowe's testimony. It is particularly as to that one witness who is the only one who testified on that subject.

Mr. Phelps. May it please the court, I did not produce that. As I recall, it came out on cross-examination over my objection that it is a collateral matter and too remote and did not bear on the issues. I think your Honor is perfectly right, it would be collateral and couldn't have any purpose, couldn't serve any purpose at this time.

The Court. It deals with something four months before.

Mr. Murman. I am asking if I am precluded from any time prior to the accident, to bring that up.

The Court. The question addressed to Mr. Rowe, as I recall, was four months before.

Mr. Murman. Three or four, as he definitely said no, not at any time. I want to show by this witness that that is not the fact, and that is the purpose of it.

Mr. Phelps. Then I enlarge on the objection, if your Honor please, that as far as Rowe is concerned, it couldn't be impeachment of the witness Rowe at this time. There would be no foundation to show the witness Rowe knew about this incident which is alleged.

Mr. Murman. Yes, it would impeach him.

Mr. Phelps. It is still a collateral matter.

Mr. Murman. He said on every occasion he tested that, on every working day, and every occasion it was working properly and counsel made the point in his argument on the motion that if the Southern Pacific didn't have knowledge of the signal not being one that could be relied on, we haven't established negligence. He produces a witness that tends to indicate that is the fact. He did that on his case. This is rebuttal of that witness, and I submit it is proper. It is proper for the plaintiff to show that.

Mr. Phelps. Purely collateral issue.

Mr. Murman. It would be a purely collateral issue had counsel not established that point in his own testimony and absolutely stated the signal had never been out of order during the four years. I am not going back four years' time, but I would ask him specifically on the three or four months before that.

Mr. Phelps. If the court please, he asked the question over my objection and he got an answer and now he wants to do this. It is too late.

The Court. *I think I will sustain the objection.*

Mr. Murman. Then I want to protect the record, and I will ask the other questions, and if counsel objects we will have to take the ruling.

Mr. Murman. Mr. Tolson, prior to the accident did you on any occasion notice that the signal stuck and remained in a position other than a vertical position after a train went by?

Mr. Phelps. Same objection, if your Honor please; it isn't proper rebuttal, wouldn't tend to impeach——

The Court. It isn't proper rebuttal. It really isn't proper rebuttal. You should have put it in at the beginning of your case, but *I will allow the question if it is directed to a point that is within a reasonable time.*

Mr. Murman. All right.

The Court. *A day or so before or afterwards, maybe even a week.*

Mr. Murman. All right, I will ask that question.

Q. Mr. Tolson, how long——

Mr. Phelps. I want to enlarge on the objection, that it is leading and suggestive.

The Court. Yes, but I will allow it.

Mr. Murman. Mr. Tolson, how long prior to the date of the accident do you last remember seeing the signal in a position other than a vertical position?

Mr. Phelps. Same objection, your Honor understands, runs to this line of questioning?

The Court. Yes.

Mr. Phelps. It wouldn't tend to impeach this witness, even remotely tend to impeach the wit-

ness. He was never asked about it. No notice on the part of the Southern Pacific Company.

A. Other than through his testing, that I would say, *it was within, oh 30 days, anyway.* I have seen him when he was testing, *it would hold in that position where it wasn't centered.*

Mr. Phelps. I will ask that go out as too remote.

Q. (By Mr. Murman). When did the signal get that way?

A. When he was testing it.

Q. *You said within 30 days of the accident?*

A. *I would say something like that.* I don't remember the exact time or date, never paid particular attention to its position, but *I have seen him take the signal and test it where it wouldn't be centered, and would stick to one side or the other and wouldn't come back.*

Q. That was when he was testing it?

A. That was when he was testing it.

Mr. Phelps. May I please—

The Court. How long before the 27th day of December was this?

A. Well, directly, a direct day I couldn't answer that only just by saying *it was within 30 days, sir,* or something like that. It wasn't—it didn't come into my mind exclusively just what time that would be.

Mr. Phelps. Then, if your Honor please, I ask that the answer go out as too remote even under your Honor's ruling, confined within a day or two.

Mr. Murman. I submit it is rebuttal.

Mr. Phelps. It is not rebuttal.

The Court. *I am going to strike the answer and instruct the jury to disregard the testimony. It isn't rebuttal and not impeachment.*

Mr. Murman. Well, I beg to differ with your Honor, and under the circumstances I have no further questions." (Emphasis ours.)

Appellant contends that prejudicial error was committed when the Court rejected and struck out the rebuttal testimony of Mr. Tolson which contradicted the testimony of appellee's signal maintenance man, Mr. Rowe, as to the operation of the wigwag crossing signal prior to the accident since such testimony was material to the issues before the Court and the jury as to appellee's knowledge that the operation of the wigwag crossing signal was so faulty it could not be relied on by motorists forced by appellee's stalled freight train to proceed over the blind crossing which the deceased was forced to use. Section 1847 of the California Code of Civil Procedure provides:

"At witness is presumed to speak the truth. *This presumption, however, may be repelled* by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or *by contradictory evidence*; and the jury are the exclusive judges of his credibility." (Emphasis ours.)

Section 2051 of the California Code of Civil Procedure provides:

"A witness may be impeached by the party against whom he was called, by contradictory evi-

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Section 2051 of the California Code of Civil Procedure provides:

"A witness may be impeached by the party against whom he was called, by contradictory evi-

dence or by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony unless he has previously received a full and unconditional pardon, based upon a certificate of rehabilitation.”

Suffice it to say that a witness may be impeached by contradictory evidence (*Fitz-Patrick v. Osborne*, (1943), 57 Cal. App. (2d) 226, 229; Supreme Court hearing denied, 229: wherein Section 2051 was specifically cited). In other words, if a witness is shown to have testified erroneously as to any particular relevant matter, such as the faulty operation of the wigwag crossing signal within thirty days of the accident, an inference of untruthfulness may be drawn as to the rest of his testimony which related to that vital issue. Hence, evidence may properly be introduced to contradict or expose the error or falsity of the particular testimony without any foundation being specially required, just as in the case of prior inconsistent statements (*Greenleaf v. Pacific Tel. & Tel. Co.*, (1919), 43 Cal. App. 691, 694; *Khan v. Zemansky*, (1922), 59 Cal. App. 324).

In order for the excluded testimony to have been properly rejected or stricken as relating to a collateral matter, it would have to clearly appear that it had no relation to the issues of the case. In *Moody v. Peirano* (1906), 4 Cal. App. 411 (Supreme Court hearing denied, 421), the Court said at page 416:

“ ‘If the answer of the witness is a matter which you would be allowed on your part to prove in evidence; if it have such a connection with the issue that you would be allowed to give it in evidence, then it is a matter on which you may contradict him.’ ”

Clearly the testimony which the Court struck out was not collateral when tested by the above quoted rule, since it related to one of the acts of negligence charged in the complaint and presented the issue of improper maintenance and operation of the wigwag crossing signal within the knowledge of appellee and in such a negligent manner as to be a proximate cause of the accident. As was said in *Will v. Southern Pacific Co.* (1941), 18 Cal. (2d) 468 (petition for rehearing denied, 478), at 473:

“When a railroad has undertaken to warn travelers of the approach of its trains by means of a crossing device, such as an automatic signal, upon which the public is encouraged to rely, failure to use due care in the maintenance of this device may constitute negligence regardless of the fact that it may have given other warning of the train’s approach.”

Since it is clear that the testimony of appellant’s witness, Mr. Tolson, contradicted that of appellee’s witness, Mr. Rowe, on a material issue of the case, the only question which remains is whether or not appellant properly presented it on rebuttal. Appellant submits that Mr. Rowe’s testimony tended to establish a new matter as to appellee’s knowledge of the faulty operation of the wigwag crossing signal in defense of

appellant's proof that the signal was not operating at the time of the accident and consequently the only opportunity appellant had to contradict such new matter as to the issue relating to the operation of the wigwag crossing signal was on rebuttal. As stated in *Pontecorvo v. Clark* (1928), 95 Cal. App. 162, at page 179:

“And the general rule may be stated to be that rebuttal or surrebuttal testimony, strictly speaking, is receivable only where new matters have been developed by the evidence of one of the parties after his case in chief has been made and concluded, although it is within the discretion of the trial court to allow a party, on ‘rebuttal or surrebuttal’, to introduce evidence with respect to relevant and material matters as to which his witnesses have testified in chief.”

In *Schomaker v. Provoo* (1950), 96 A.C.A. 814, 815-816, there was rebuttal testimony offered to contradict the inference of intoxication as an explanation of the bizarre conduct of the driver of an automobile. It was argued that the only logical purpose of such testimony was to impeach the credibility of the driver as a witness and that such impeachment was improper. The trial Court held otherwise and the Appellate Court concurred, holding that the evidence was relevant in attempting an explanation of the extraordinary conduct of the driver. In so holding, the Court cited *Moody v. Peirano* (1906), 4 Cal. App. 411, where the Court said at page 418:

“Unless it can be seen that the evidence is without any weight whatever in determining the issue

the action of the court in receiving it will not be reversed.

The tendency of modern decision is to admit any evidence which may have a tendency to illustrate or throw any light on the transaction in controversy, or give any weight in determining the issue, leaving the strength of such tendency or the amount of such weight to be determined by the jury;''

In light of certain instructions subsequently given on the subject of wigwag crossing signals, it is even more clear that appellant was prejudiced by the Court's ruling striking out Mr. Tolson's rebuttal testimony. Among other things, the Court instructed the jury to minimize appellee's negligence if they found that the crossing was guarded, since such fact relieved the railroad from assuming as much care as when the crossing is unguarded (R. 531). The jury was told that, all else being equal, failure of the wigwag to operate was not negligence in the absence of proof of appellee's knowledge of the same or want of care in regard to the same (R. 532-533). The Court instructed that the deceased was required to exercise greater vigilance and care than would ordinarily be required of him in circumstances where the danger of moving trains was not reasonably to be anticipated and any neglect in this regard branded the deceased as guilty of negligence (R. 544). The Court stated that the deceased could not blindly rely on the signal if it was not operating and that if he did so he was guilty of negligence (R. 545-546). The jury was ad-

monished that the deceased had a continuing duty to stop, look and listen as he approached each track until he was safely clear and any failure on his part to discharge this duty was negligence (R. 546-547). The jury was also told that the deceased was under a duty to yield the right-of-way at the crossing (R. 543), and that a railroad track was itself a warning of danger without any other sign or signal of warning (R. 543).

In *Eastman v. A. T. & S. F. Ry. Co.* (1942), 51 Cal. App. (2d) 653, (Supreme Court hearing denied, 667), plaintiff's decedent was killed after he stopped at a railroad crossing guarded by a wigwag which plaintiff's witness testified was not seen in operation. Commenting that the same quantum of care is not required at a guarded crossing where a railroad has encouraged travelers to relax their vigil as to crossing dangers, the Court said at page 664:

“The present case is admittedly a guarded crossing case, and testimony was placed before the jury that as the train neared the crossing the engine crew gave no warning of its approach and the wig-wag was not operating. Therefore, under the circumstances of the case and the law as declared in the decisions above cited, a lesser degree of care was reasonably to be expected from the decedent than would have been the case had the wig-wag signal not been installed and used at that particular crossing.”

The law as to deceased stopping, looking and listening whether the crossing is guarded or not is set forth

in *Emmolo v. Southern Pacific Co.* (1949), 91 Cal. App. (2d) 87, at page 91:

“Appellants’ contention that plaintiff did not obtain, as they stated, a ‘reasonably assuring view’ of the tracks, is but to argue the weight of the evidence. Furthermore there is testimony to sustain the implied finding of the jury that plaintiff did obtain a view, which to a reasonably prudent man would give reasonable assurance of his safety. Therefore applying the rule as enunciated in the *Pietrofitta* and *Toschi* cases, *supra*, to the facts and circumstances of the present case, we can no more say that plaintiff herein was guilty of contributory negligence as a matter of law than we could in the earlier *Pietrofitta* case. The plaintiff *Emmolo* did stop, he did look, and he did listen. Whether or not his choice of view was that of a reasonably prudent man, exercising reasonable precautions for his own safety, was a question properly left to the jury.”

Thus in *Music v. Southern Pacific Co.* (1949), 91 Cal. App. (2d) 93, the Court said at page 96:

“Whether the place selected by respondents to stop and look was the best possible place under the circumstances is immaterial. The operator of an automobile is under a duty to use only that care which a reasonably cautious man would have used under similar circumstances in selecting the place of view. (*Nelson v. Southern Pacific Co.*, 8 Cal. (2d) 648, 652 (67 P. (2d) 682); *Pietrofitta v. Southern Pacific Co.*, 107 Cal. App. 575 (290 P. 597).) After having so conducted himself, whether or not it was negligent for him to have then proceeded up the grade and across the track, likewise must depend upon whether a reasonable

man would have so proceeded under the circumstances then existing. (*Nelson v. Southern Pacific Co.*, supra.) We are unable to say as a matter of law that reasonable men would not have done as respondent husband did and therefore the question was properly left to the jury.”

In the recent case of *Southern Pacific Company v. Souza*, decided January 30, 1950, 179 Fed. (2d) 691, which involved a grade crossing accident, this Court said at page 693:

“Appellant argues that the California Courts have established definite standards of care for highway travelers at railroad crossings and that appellee’s own testimony shows that he failed to measure up to those standards and was therefore contributorily negligent as a matter of law. Many of the earlier California decisions cited by appellant would seem to sustain this argument. However, the more recent decisions of the Courts of California, although they have not expressly overruled the old cases, show a definite policy trend away from the ‘Crystallized fact’ cases and favor making the standard of care a question for the determination of the jury. Several California decisions have held on similar fact situations that whether or not the driver’s choice of a place to look and his failure to look a second time constitute negligence were questions of fact for the jury.”

In other words, stopping, looking and listening, if done at all as deceased did here, is sufficient whether the crossing is guarded or not. Also whether or not the deceased continued to do so as he approached each

track until he was safely clear of all tracks is not contributory negligence as a matter of law as the above referred-to instructions of the court indicate. In addition, the jury was instructed as to the yielding of the right-of-way with no admonition that in failing to do so, the jury must find that the deceased had knowledge of the approaching train.

As to warnings, this Court, in the *Souza* case, said at page 694:

“Appellant also argues that it was error for the trial court to refuse to give its proposed instruction to the effect that the train crew had the right to presume that the driver would exercise due care. We think that other instructions concerning the rights and duties of the railroad sufficiently and fairly explained the railroad’s required standard of care. Furthermore, the proposed instruction was defective for it failed to state that before the members of the crew could rely on this presumption they must themselves be exercising reasonable care. The instruction, as worded, might well have been interpreted by the jury to excuse a failure to ring the bell or sound the whistle.”

In view of the court’s instructions, as well as apart therefrom, it is clear that appellant was prejudiced when the court struck out the testimony of Mr. Tolson offered in rebuttal to appellee’s showing that the wigwag crossing signal had been checked every working day for four years prior to the accident and had never been found to have been out of order or in need of repairs, particularly where the complaint alleged,

and appellant's proof in her case in chief had established, that the crossing signal was not operating at the time that appellee's speeding passenger train killed appellant's husband.

III.

PREJUDICIAL ERROR WAS COMMITTED WHEN THE COURT IN ITS INSTRUCTIONS REPEATEDLY DIRECTED THE JURY TO FIND IN FAVOR OF APPELLEE.

Instructions proposed by appellant and given by the Court were mere statements of principles of law. Many instructions proposed by appellee and given by the Court contained lengthy and detailed repetition. At least sixteen of these favored the questionable formula type of instruction which ended with the admonition to the jury that appellee was entitled to a verdict. (See third Specification of Error, *supra*.) The jury was not directed to find for appellant. In particular, the formula instructions, all in appellee's favor, could well have been understood by the jury as directing a verdict for appellee. Hence the defense verdict herein.

At the outset appellant is met with the problem that since no exceptions were taken or objections made at the trial to any of these sixteen instructions repeatedly directing the jury to find for appellee, appellant cannot now complain of any of them. It may be that any one of the instructions is not prejudicially erroneous. Appellant notes that Rule 51,

Rules of Civil Procedure, by its language, applies to "an instruction."

As a practical matter, the reason for this rule fails when there is wholesale repetition hammering home the compelling admonition that the jury must find for appellee. With irreparable damage done during an hour and a half of instructions, the few minutes occupied thereafter by the court admonishing the jury otherwise, had appellant excepted and objected to the repetitious instructions to the contrary, would clearly have been meaningless. Thus if applicable, Rule 51 becomes a vicious "heads I win, tails you lose" formula. The Court could not unring a bell in a few minutes which had been ringing continuously in the ears of the jury for an hour and a half.

The point being made by appellant here has received support in the recent California case of *Taha v. Finegold* (1947), 81 Cal. App. (2d) 536; Supreme Court hearing denied, 547; where the court said at page 543:

"The instructions offered by the plaintiff and given by the Court were mere statements of principles of law. In contrast, in many of the instructions offered by defendant and given by the Court, after stating the particular principle of law, the instructions then go on as 'formula' instructions, 11 ending up, 'you will render your verdict in favor of the defendants,' or 'plaintiff will not be entitled to recover.'

Formula instructions should not be given. As said in *Tice v. Pacific Elec. Ry. Co.*, 36 Cal. App. 2d 66, 71 (96 P. 2d 1022, 97 P. 2d 844), formula

instructions 'are not calculated best to serve most successfully the administration of justice. Their final disappearance will improve the conduct of court trials.' *While the giving of formula instructions is not in itself prejudicial error, the giving of them here, added to the other circumstances of the case, combined to deny the plaintiff a fair trial.*" (Emphasis ours.)

As far as formula instructions go, the statements in the *Taha* case are not new because such instructions have been frowned upon consistently by the Supreme Court of California, an example of which appears in *Dahms v. General Elevator Co.*, (1932), 214 Cal. 733, at page 742:

"One other contention of appellant warrants some mention. It complains of an instruction which it refers to as a 'formula' instruction, and contends that it was erroneously given for the reason that it does not contain the charge that before defendant can be held liable the jury must find that it knew or should have known of the defective condition of the elevator and safety device. Appellant relies on the rule that a formula instruction must embrace all the elements essential to a recovery and a failure so to do constitutes error. We have no quarrel with that doctrine."

The indelible impression left by the repetition that the jury was to find for appellee was such that no corrective comment by the Court subsequently could have possibly erased its disastrous effect on appellant's case. The damage had been done and the defense verdict of the jury was returned accordingly.

Recently, at least one Federal Court has seen fit to refuse to apply Rule 51 where the reason for the rule no longer existed. Thus in *Willis v. American Barge Line Co.*, decided October 17, 1949, (U.S.D.C., W.D., Pa.) 87 Fed. Supp. 919, plaintiff, as the administrator of the estate of the deceased, brought a wrongful death action on the grounds of negligence against the defendant barge line. A verdict was returned for the defendant and the plaintiff moved for a new trial. In the interest of justice, the Court granted a new trial on failure to charge the jury that the deceased was presumed to be free of contributory negligence with the defendant having the burden of establishing contributory negligence by a preponderance or weight of the evidence. After the charge to the jury, plaintiff had not excepted to or made objection to the instructions which the Court subsequently determined were erroneous. In this connection, the Court stated at page 920:

“No particular instructions were requested by counsel for the plaintiff when an opportunity was given at the conclusion of the charge relative to the burden of proof as to contributory negligence, and the presumption which exists that the deceased was free from contributory negligence. However, the Court must be aware that it is responsible for the general effect of the charge as a whole, and that a requirement exists to instruct the jury as to matters of law that are fundamental to the case. *Reithof v. Pittsburgh Railways Co.*, 361 Pa. 489, 64 A. 2d 346.

The right exists in the trial court to grant a new trial whenever, in its opinion, the justice in a particular case so requires, and in the exercise

of my discretion it is believed that the circumstances in this proceeding justify such action. *Marsh v. Illinois Central R. Co.*, 5 Cir., 175 F. 2d 498.

In view of the foregoing, I believe that the *trial was unsatisfactory and in the interests of justice* a new trial should be granted. *Sonson v. J. C. Penney Co.*, 361 Pa. 572, 65 A. 382.

An appropriate order will be filed.”
(Emphasis ours.)

Appellant contends that the Court below erred to the prejudice of appellant in directing the jury to find for appellee on at least sixteen separate occasions during the course of the instructions.

IV.

THE COURT ERRED IN DENYING APPELLANT A NEW TRIAL.

After judgment on the verdict was entered for appellee (R. 9), appellant moved for a new trial (R. 11). In so moving, appellant urged that she was prevented from having a fair trial when the Court struck out appellant's rebuttal testimony showing that the railroad knew before the fatal accident that the wigwag crossing signal was so faulty it could not be relied on by the deceased who was forced by the stalled freight train to proceed over the blind crossing where appellee's passenger train killed him (R. 513). It was also urged that a fair trial was prevented by the overruling of appellant's exceptions to errors in the Court's instructions which excluded the presumption

of ordinary care from the jury's deliberations. (R. 563). In addition, the appellant contended the motion should be granted because, by repetitious formula instructions to the jury, the court erroneously and repeatedly directed a verdict for appellee (R. 523, 526, 527, 528, 536, 538, 539, 541, 544, 545, 550, 551, 558). Thus the court abused its discretion and committed prejudicial errors resulting in a verdict for appellee that is contrary to law and against the evidence. (R. 574-575).

A new trial should have been granted (Rule 59, Rules of Civil Procedure). The authorities cited hereinabove support appellant's contentions, urged on the motion for new trial and now repeated to this Court in support of appellant's appeal from the judgment below, showing that judgment should be reversed. In *Southern Pac. v. Guthrie*, decided December 30, 1949, 180 Fed. (2d) 295, this Court said at page 301:

"If a judge states the law incorrectly, or refuses to state it at all, on a point material to the issue, the party aggrieved will be entitled to a new trial."

Clearly, if the Court committed prejudicial error in its instructions, and appellant in all sincerity urges that it did, the jury then erred in its verdict, since, right or wrong, the jury had to accept without question the law as stated and the directions given by the Court and be guided accordingly in its deliberations. Consequently, the Court erred in denying appellant's motion for an order setting aside the verdict and judgment entered thereon in favor of appellee and for a new trial.

CONCLUSION.

The record shows that if the Court had permitted appellant to have been aided by the statutory presumption of ordinary care and lawful conduct, she would have proved conclusively that her deceased husband carefully started in a lawful manner to cross appellee's tracks and was killed in the process of doing so because of the railroad's negligence in the maintenance of its faulty wigwag crossing signal and the operation of its passenger train speeding silently towards the fatal accident. Prejudicial error was committed (1) when the Court's instructions removed the presumption from the case, (2) when the court struck out pertinent rebuttal evidence establishing the falsity of appellee's testimony as to lack of knowledge of the railroad's faulty crossing signal which became a death trap for appellant's husband, and (3) when the court repeatedly instructed the jury to find for appellee which the jury did.

In the interests of justice the judgment below must be reversed.

Dated, San Francisco, California,

November 1, 1950.

Respectfully submitted,

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No. 12,593

IN THE

United States
Court of Appeals

For the Ninth Circuit

NELDA SHANAHAN,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY,

Appellee.

APPELLEE'S BRIEF

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No. 12,593

IN THE

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APPELLEE'S BRIEF

I.

STATEMENT OF THE CASE

Preliminary

It is necessary to state the facts. Appellant's statement studiously avoids established facts and the basis of the jury's verdict for the defendant. This is coupled with a contention that the court need only review "appellant's evidence" to consider claims of error (Appellant's Op. Brief, p. 2), which, even as made, are technical only, in the

hope that there will thus be by-passed that review of the case as a whole which demonstrates that the jury could not fairly have reached any other result.

At about 7:45 of the morning of December 27, 1948 (see pleadings, R. 35, 69), Ellis E. Shanahan drove his automobile onto the tracks and directly in front of a Southern Pacific passenger train, the Beaver, which was proceeding south on its regular daily run through the unincorporated town of Anderson, California. Shanahan's car was hit as it drove in a westerly direction over the second set of tracks, the mainline (R. 65, 121, 306, 357, 400, 469, 487). He was killed instantly.

Before reaching the track on which he was struck Shanahan had passed a boulevard stop sign from which point, if he had stopped,¹ he could have seen northerly up the track, the direction from which the train was coming, more than a mile.² The only direct evidence was that the wig-wag signal was working³ (R. 399, 401, 469, 470, 471) and that the crossing whistles from the train were properly sounded⁴ (R. 302, 303, 331, 355, 356, 359, 360, 390, 401, 428, 429, 457, 458, 469, 472, 481). In spite of the wig-wag and the clearly visible train, Shanahan drove on. He had to first cross a

1. Appellant claims that Shanahan did stop at the stop sign, but the witnesses on whom she relies were clear in their testimony that the only stop made was at the bottom of a slight incline leading to the tracks. This claim is discussed in detail below (pp. 25-29).

2. There was an attempt by appellant to dispute this, but the diagram and photograph reproduced show that the view was unobstructed.

3. Evidence of witnesses who saw and heard the wig-wag working is set out below (pp. 11-18).

4. Two independent witnesses, Lela Johnson and Alex M. Andree, as well as three trainmen and the engineer and fireman, testified that they heard the signals.

house track, which was clear at the time, and his view up the track was unlimited.⁵ He could have stopped easily at his speed of about five miles⁶ an hour if he had looked, and if he had looked he would have seen the approaching train which was bearing down on him, its headlights on,⁷ its whistles sounding.

The Facts of the Accident

Shanahan, an employee of the Internal Revenue Department of the United States, was a resident of the town of Anderson. He had lived in the vicinity since he was a boy, more than thirty years (R. 161), and had been Justice of the Peace of Anderson Township (R. 162). The Shanahan home was east of the Southern Pacific Company's mainline track, which passed through the town of Anderson. U. S. 99, the main automobile highway up the Sacramento Valley, lies directly west of the tracks. He crossed the tracks daily in going to and from work. The train involved in the accident was a regularly scheduled passenger train. It was a little late on its running schedule, but appellant established by the local constable that this was to be expected because it normally came through Anderson between 7:20 and 8:00 A. M. (R. 168). Shanahan was thoroughly familiar with the crossing and the railroad tracks and railroad operations.

5. The first track which Shanahan came to was clear. The photograph reproduced shows the unlimited view Shanahan had while still eight feet east of this track and twenty-six feet east of the center line of the main track. Neither the station nor any cars blocked Shanahan's vision.

6. This estimate is from appellant's witnesses Hewes and De-Rosa. The fireman saw the car approaching but could not estimate its speed (R. 356). Another witness, Griffith, estimated the speed at 8 to 10 miles per hour (R. 413-414).

7. There were two lights on bright, one above the other, shining directly down the track.

The Southern Pacific mainline runs north up the Sacramento Valley through the unincorporated community of Anderson and on to Redding and points north. Howard Street runs westerly into Center Street in Anderson and after an offset to the south along Center Street continues on westerly across the railroad tracks to Highway 99 (see diagram, Exhibit D and photographs reproduced) at a point 146.7 feet south of the Southern Pacific station (R. 204).

The crossing is protected by a standard wig-wag signal (R. 272), the familiar mechanical device that swings back and forth, displays a red light in the disc of the pendulum and rings a bell (see photographs reproduced). In addition there was the usual standard crossbuck warning and approaching the tracks from the east (as the deceased did) there was an arterial stop sign 33.7 feet east of the center of the mainline track (R. 203) requiring all motorists to stop before crossing the tracks.⁸

A conception of the locality, position of the street, the railroad tracks, the wig-wag signal, the arterial stop sign, the station, location of fixed objects and the like can best be had from a diagram, Defendant's Exhibit D.⁹ This diagram is reproduced herein for convenience of the Court. In reproducing it, a reduction in size was made. Distances can be scaled on the original exhibit on the original scale, or distances can be scaled on the reproduced diagram, for

8. Evidence that Shanahan did not stop at the sign is detailed below.

9. Introduced as Defendant's Exhibit D. It was prepared by an engineer from a survey and is accurately drawn to scale. The diagram introduced on Appellant's case was not established by the person making it and was introduced for illustration only and not as a scale diagram.

HIGHWAY

U.S. 99

STATION

FIRE
HOUSE

STORE

C E N T E R

ST.

S T R E E T

ST.

NORTH

HOWARD ST.

FERRY

SCALE:

ONE INCH ON MAP EQUALS TWENTY FEET IN REALITY



though the scale on the exhibit will not apply, the graphic scale on the diagram was, of course, reduced proportionately and in the same ratio as the diagram as a whole.

Three tracks cross Howard Street. From the east the first track reached is a house track.¹⁰ West of this track 18.3 feet is the mainline (R. 203) (where the accident happened). The third and most westerly track is the passing track.¹¹

The view of the driver approaching the tracks from the east is demonstrated by pictures in evidence. Defendant's Exhibit M is here reproduced showing the view down the tracks in the direction from which the train was coming.¹² Opposite the arterial stop sign the view up the track is open and free.¹³ A straight edge placed at a point on the road opposite the stop sign and just clearing the station building demonstrates this.¹⁴

10. The house track is the first set of rails seen in the photograph reproduced. There was nothing on this track at the time of the accident.

11. A freight train was on the passing track, but the nearest car was north of the station. This train did not block Shanahan's view of the approaching train.

12. The photograph reproduced is Defendant's Exhibit M taken on Howard Street, 26 feet east of the center of the main line track and looking in a northerly direction from which the train was coming (R. 265). It shows the driver's view at that point. The first or nearest set of tracks is the house track and not the track where the collision took place.

13. The stop sign is only 7.7 feet east of the point where the photograph (Exhibit M) was taken. The diagram demonstrates that nothing obstructs the view from the stop sign.

14. The station building in the reproduced diagram is defined by the heavy black line with hatch marks. Lines west, north and east extending out from the station indicate a loading platform seen in the photograph. This is not high enough to obscure the view of a train. The straight edge should be along the station proper indicated by the heavy line with hatching.

Before turning from Center Street into the Howard Street crossing there is a slight incline up to the tracks. This is shown on Defendant's Exhibit I, which has been reproduced.¹⁵ The start of the incline is fixed on the diagram by the easterly end of the most northerly dotted line of Howard Street extending into Center Street (R. 213). As will appear later, it was at this point that Shanahan stopped and from this point continued on without stopping again until the collision.¹⁶ The view at this point was somewhat obscured by the station. The station did not obscure the view at the boulevard stop sign where he should have and, indeed, was required to stop.¹⁷

Approximately an hour (R. 403) before the accident a northbound freight train had pulled into the passing (most northerly) track and had stopped with its caboose north of but in the vicinity of the station (R. 395).¹⁸ The Howard Street crossing was clear. There were no other railroad cars around (R. 157, 158) and the train on the passing track did not obstruct the view of the main line from the east (R. 158).

Shanahan drove south parallel to the tracks and along Center Street immediately before the accident and as he

15. The photograph reproduced is Defendant's Exhibit I taken at the intersection of Howard and Center Streets, 100 feet east of the main line track, and looking in a westerly direction. It shows the bottom of the slight incline where Shanahan was seen to stop. Obviously this is marked by the puddle showing in the picture. The stop sign can be seen at the top of the incline and a considerable distance west. The wig-wag signal is also shown.

16. There can be no doubt that Shanahan stopped only at the bottom of the incline (R. 99, 133, 134, 136). This is discussed in more detail below.

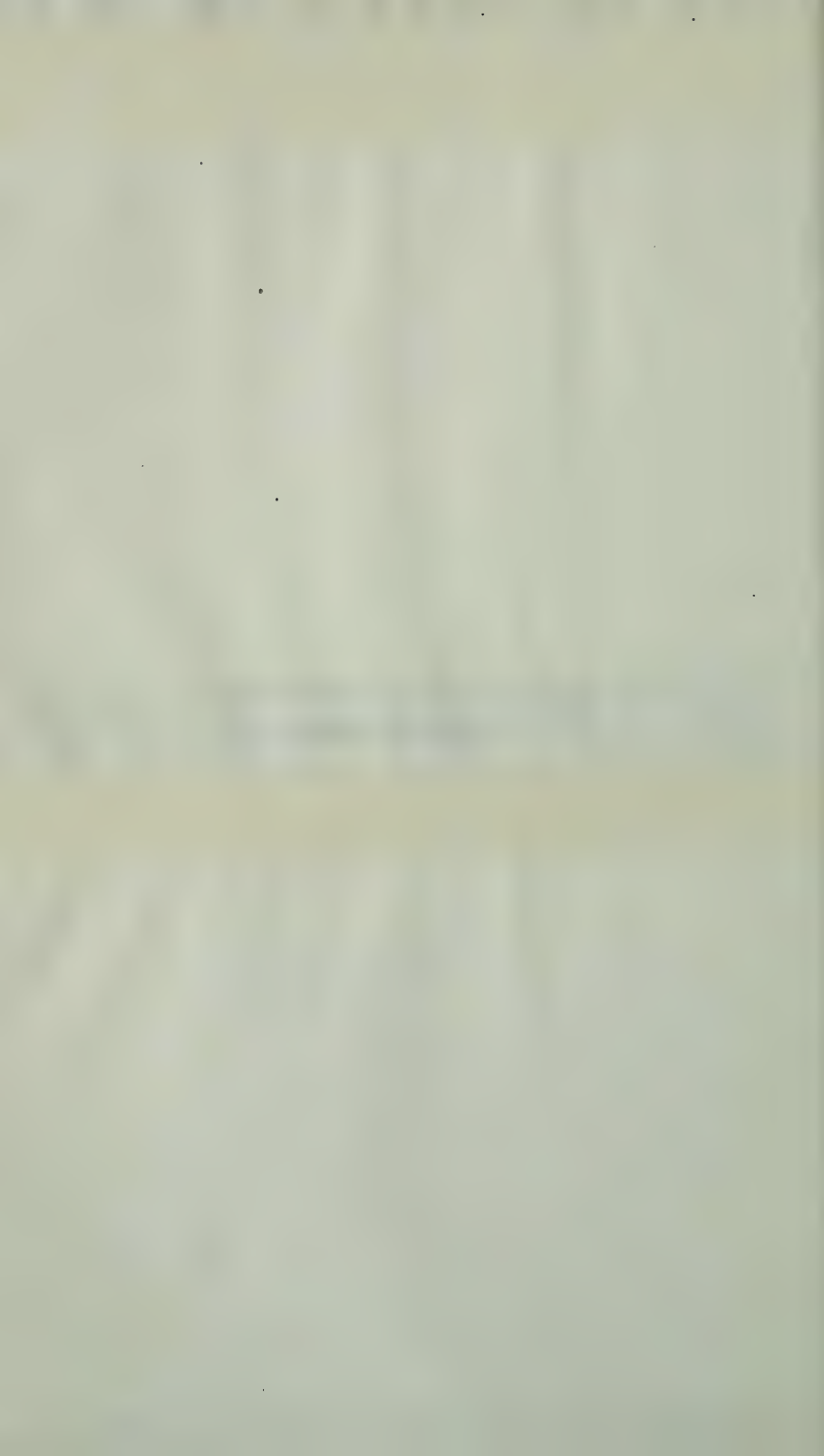
17. See footnote 13, p.

18. The train on the passing track, being clear of Howard Street, did not activate the wig-wag. The wig-wag commenced functioning with the approach of the passenger train.



Defendant's Exhibit I





did so he was seen by the occupants of an automobile which turned left from east Howard Street behind the Shanahan car. From this point on Shanahan's conduct was observed by these two men, *Hewes* and *DeRosa* (59-65, 75-80, 116-121, 130-139), called as witnesses by the plaintiff, and his crossing of the railroad tracks and the accident was witnessed by three other persons.¹⁹ These witnesses were *Mrs. Lela Johnson*²⁰ (R. 466-491), a woman living at Anderson, *Philip S. Kafer*²¹ (R. 347-382), the fireman on the train involved, and *Luther L. Griffith*²² (R. 392-424), the conductor of the train which had stopped on the passing track. His actions having been thus observed and described by these witnesses, and the physical facts and the sounding of warnings (R. 389-390, 428, 429, 457, 469) and the operation of the wig-wag having been established by other witnesses²³ (R. 469-470, 471), the jury could quite properly determine for itself how Shanahan drove over the crossing and what care, if any, he took for himself. There was no compulsion for the jury to find in accordance with any presumption in this regard.

Shanahan was seen to drive up to the foot of a slight incline east of the railroad tracks at the Howard Street

19. Appellant's Opening Brief (p. 8) states that there were only two eye witnesses to the accident. This is wrong.

20. Mrs. Johnson saw the approach of the train, heard its whistle being sounded, saw the headlights, saw and heard the wig-wag operating at Howard Street and saw the Shanahan car before and at the instant of the impact.

21. Kafer saw the Shanahan automobile approach and hollered to the engineer to apply the brakes.

22. Griffith saw and heard the train approaching, saw and heard the wig-wag working and saw the automobile approaching the crossing before it was struck.

23. Lela Johnson. Her testimony is quoted at length below.

crossing where he stopped²⁴ (R. 133, 134, 135, 99). He was then 50 feet²⁵ east of the nearest track and 68 feet²⁶ east of the track on which he was struck. He was observed to rub his hand over the inside of the windshield of his coupe (R. 61, 79, 118, 119), wiping the portion directly in front of him.²⁷ Evidently, he was endeavoring to wipe off the moisture that had formed on the inside of the windshield, the same moisture that steamed up the windshield of the car occupied by Hewes and DeRosa (R. 61, 79, 118), directly behind him. He was not seen to wipe the windshield and window to his right²⁸ (R. 79) where steam would obstruct his view of a train coming from the north. There can be no presumption that he took this precaution.

Meanwhile, Southern Pacific Company's passenger train No. 13, the Beaver, was running southward, from Redding, through the unincorporated community of Anderson. The train was a few minutes behind schedule but this was not unusual for this train (R. 168) and it was proceeding at a speed variously estimated at between 65 and 70 miles an hour and within the speed restrictions set by the company,²⁹

24. See footnote 16, p. 6. This is fully discussed, pp. 25-29.

25. This distance can be scaled on the diagram reproduced.

26. The nearest track was 18.3 feet east of the main line.

27. The windows of the Shanahan car were up. Highway Patrol Officer Sublett investigated the wrecked car and testified that the windows were up. There was no testimony by Hewes or DeRosa that Shanahan wiped off the windshield on the right hand side or the side window. If the windshield in front of him was steamed up the other windows were also.

28. His actions were described by Hewes and DeRosa.

29. That the speed, even at 70 miles per hour, was within the permitted speed was established by the engineer. There was then an objection and the question was withdrawn upon counsel's statement, in effect, that no claim of violation of company rules was asserted (R. 303-304).

and a lawful speed. The fixed headlight was on bright, not dim (R. 321, 354, 355). The Mars light, the extra headlight that swings from side to side, to give the engineer a vision to the side of the beam of the fixed headlight, had been centered (R. 321, 354, 355, 363), as railroad rules required, on approaching the freight train, to permit the freight train crew to identify the passenger train. The Mars light with the main headlight, was trained directly down the track. All of the necessary crossing whistles were sounded³⁰ and this was established by independent witnesses³¹ as well as the engineer and fireman of the passenger train and the crew members of the freight train.³²

As the passenger train approached the Howard Street crossing the wig-wag at that crossing began to operate (R. 399, 400, 469, 470, 471). It moved backward and forward, the red light came on and the bell sounded. This is the testimony of eye-witnesses.

Notwithstanding all of these warnings, Shanahan, in the face of the train, started up from his position at the foot of the slight incline at the Howard Street crossing, passed the boulevard stop sign, where by law he was required to stop, and proceeded across the first track and onto the next set of tracks, the mainline, where he was struck by the engine of the passenger train. Some 200 feet north of the crossing (R. 358, 359),³³ the fireman, from whose direction

30. Crossing signals were sounded for other crossings in the vicinity as well as Howard Street. The bell was ringing as well.

31. Lela Johnson and Alex M. Andree.

32. Griffith and Thomas. In addition the head brakeman, Cailouette, of the passenger train heard the whistles.

33. Kafer estimated that he was about opposite the train order post which would scale on the diagram at about 220 feet from the crossing. The mark he made on the diagram scales at about 170 feet from the crossing.

Shanahan was coming, saw the automobile driving onto the tracks, shouted to the engineer and the emergency brakes were applied immediately (R. 356, 357, 305, 306). The train was unable to stop. The Shanahan automobile was struck directly behind the right hand door, thrown to the side of the track, and Shanahan was immediately killed.

The accident happened in the early morning. It was "breaking day." There was sufficient light to see objects at a distance without artificial light, although it was still somewhat dark. The weather was cloudy, overcast, and described as somewhat "misty" (R. 148, 72, 309, 403, 472, 473, 482). There was sufficient moisture in the atmosphere, and it was sufficiently cold, so that automobile windshields and windows "fogged up" or steamed up (R. 78, 152).

The evidence established that Southern Pacific train No. 13 was operated properly, and that the wig-wag signal, the crossing protection at the Howard Street crossing, functioned properly. The engine had sounded crossing whistles, in fact had whistled almost continuously since entering Anderson, and its headlights were on bright. The deceased drove his automobile directly into the path of a fast moving locomotive despite the fact that the crossing wig-wag gave warning of its approach and it was clearly visible to him, had he looked for it. There could be no presumption that he looked. He was not seen to turn his head. Had he looked he must have seen. The facts abundantly demonstrate that there was no negligence on the part of the Southern Pacific Company, the respondent, and that Ellis E. Shanahan negligently and carelessly operated his motor vehicle so as to drive it directly into the path of the train. The facts conclusively established that Southern Pacific was entitled to verdict, and the jury gave it its verdict.

**Assumptions and Claims of Appellant
Not Supported by the Record**

Appellant made various claims of negligence, and various claims to excuse deceased's contributory negligence, none of which the jury would accept. One obvious reason for this was that the claims which were made before the jury were not supported by the evidence. Again on appeal we find appellant making assumptions, statements and claims in her behalf which are contrary to the record and a distortion of the evidence.

We do not undertake to discuss all of the inaccuracies in appellant's brief but shall confine ourselves to an exposure of some of the most exaggerated claims made by appellant.

THE WIG-WAG.

There was a contention that the wig-wag did not function, but *appellant's contention that the wig-wag did not functions is contrary to all the direct evidence*. In her brief appellant, without qualification, represents as an established fact that the wig-wag was not working. To so state is to arbitrarily disregard the evidence of the only eye witnesses who saw the wig-wag operating and is an imposition on the Court.

That the wig-wag was operating was established to the satisfaction of the jury by the unqualified testimony of witnesses who saw and heard it just before the accident.

Mrs. Lela Johnson, an independent witness, a resident of Anderson, saw the accident from her front yard. Her testimony left no doubt that the wig-wag was going, its light on and bell ringing as the Shanahan automobile drove onto the crossing. She testified:

"Q. I am asking you if at any time that you were standing there in your front yard that morning and as the train was coming up to the crossing and as the car approached the crossing, did you see a wigwag?

A. I saw it then when I looked at the crossing.

Q. When you looked at the crossing, can you tell us whether or not the wigwag was in operation?

A. It was working and the bell was ringing.

Q. Did you hear the bell ringing?

A. Yes, sir, I heard the bell ringing.

Q. Did you see a light on the wigwag?

A. Yes, sir, I did.

Q. Did you see it wag back and forth?

A. Yes, I sure did." (R. 469-470)

She further testified:

"Q. That is when you saw the automobile at that time? A. Yes, I saw the car.

Q. And at the same time you saw the wig-wag in operation? A. Yes, sir, it was.

Q. And had you heard the bell on the wig-wag before that? A. Yes, sir, I had.

Q. Had you heard the bell on the wig-wag before you heard the whistle for the train or after?

A. Well, I heard the train coming down the track, then I paid attention to the bell. **The wig-wag was running before the train got there and the bell was ringing.**" (R. 471)

Luther L. Griffith, was the conductor on the freight train which was in the siding at the time of the accident. His train had pulled into the siding about one hour before to permit three southbound trains to go by. He observed the wig-wag signal working properly for the two trains that

preceded the one involved in the accident.³⁴ The wig-wag, its bell and light, were seen by him to function as it was intended to. As the passenger train involved approached he was standing on the station platform and crossed over to a position behind his caboose (R. 398). He saw the Shanahan automobile approaching the crossing. He testified that the wig-wag was working at that time. His testimony was:

“Q. Then will you tell us as best you can, as you were standing there behind the caboose, the train went by; first, can you tell us whether or not you made any observation as to whether the wig-wag was working?

A. **The wig-wag was working.**

Q. This was as 13 was approaching the crossing?

A. No. 13.” (R. 399)

Highway Patrol Officer Lloyd Sublett responded to an emergency call, and arrived at the scene of the accident to investigate it at about 8:15 A. M. (R. 215). He was still in the course of his investigation when the signal maintainer, James R. Rowe, arrived on his track car to make a test of the signal (R. 219-220). The wig-wag signal had not been touched up to this time and Officer Sublett went with Signalman Rowe to observe the results of the test. Also present was the coroner (R. 219). In the presence of Officer Sublett and the coroner, the wig-wag was tested and found to be working properly. Highway Patrol Officer Sublett's testimony is perfectly clear:

“Q. All right, now, will you tell us what was done in testing the bell and what the results of that test were?

A. Well, Mr. Rowe opened up the control that

34. A southbound train had come through Anderson only about 10-15 minutes before the accident. The signal worked properly then (R. 397).

houses the relays that operate the bell and he short-circuited the relays out, the bell started ringing, and **I observed the light was lighted, the red light, and the banner of the wig-wag.**

Q. That is the red light in the wig-wag was burning?

A. Yes.

Q. The bell rang properly?

A. That's right.

Q. And what about the movement of the arm of the wig-wag?

A. **It moved as normally should, normally does.**

Q. And you tested more than once, he tested it more than once—

A. Yes, he tested, those relays, one for the southbound movement of trains, one for the northbound movement, and he tested it two or three times to see if it would operate each time, which it did." (R. 219-220)

Although the signal worked properly upon these tests and no repairs were required and none were made (R. 283), Officer Sublett made doubly sure by returning to the scene of the accident later on in the morning of the same day to observe for himself the workings of the signal when activated by both southbound and northbound trains. He testified that it worked properly, as follows:

"Q. Now then, may I ask you this: Did you make any other observations of your own with respect to the working of that wig-wag signal on that day?

A. Yes, on two occasions I **checked the operation of it while trains were passing the point and approaching the wig-wag.**

Q. And did it operate correctly on that occasion?

A. It did.

Q. And will you tell us whether that was for a movement—when the train moved over the main line?

A. Yes, it was a train moving through and passing right on through the town of Anderson in both cases.

Q. Can you tell us whether it was from the north or from the south?

A. The first train was a freight train from the north. The second train was a train, No. 16 from the south." (R. 221-222)

Signal Maintainer James R. Rowe testified to his inspection after the accident and that the signal worked properly (R. 281-282), that no repairs were made and none was required (R. 283). He also testified that the wig-wag signal was tested by him regularly on working days and he explained the manner in which it operated. The signal is so constructed that in the event that something goes wrong with the signal a separate circuit supplied by a battery will cause the wig-wag to commence operating, so that, if out of repair the signal will commence its warning rather than fail to work for the passing motorists (R. 272-275).³⁵

From this evidence there was only one conclusion which the jury could have drawn and that was that the signal was operating properly at the time of the accident. There was an attempt by the plaintiff's witnesses, Hewes and DeRosa, to say that the wig-wag was not working because they did not see it. The attempt failed, however, when both of these witnesses admitted on cross examination that they could not say whether the wig-wag was working or not (R. 87-88, 158-159).

35. Rowe testified that in his experiences as a signal maintainer he knew of no condition that could cause the signal to work properly when tested as he did but to not work 2-2½ hours before (R. 287-288).

Hewes was confronted with a statement taken immediately after the accident which he admitted he made and which he finally admitted was a true and correct statement. In his statement immediately after the accident he had said **"I cannot state whether or not the wig-wag signal at the crossing was operating at the time of the accident or not * * *"** Counsel for plaintiff, in an effort to keep this statement out of evidence placed his own construction on the witnesses' prior testimony and in effect admitted that, whatever he may now claim for Hewes testimony, it could mean no more than that he did not know whether the wig-wag was working or not. The record in this respect is:

"Mr. Phelps: I will read this to you and ask you if you made this statement and if it isn't true and correct and this was what you said at that time: 'I cannot state whether or not the wig-wag signal at the crossing was operating at the time of the accident or not, although I did not see any type of light burning or any signal at the crossing and did not observe any signal at the crossing. I also did not hear any signal bells ring, but this may also be due to the fact that the windows were closed on my car.'

Mr. Murman: I submit that is not impeaching, if your Honor please. That is consistent with the witness' testimony.

Mr. Phelps: Well—

The Court: Just a minute. I will allow the matter that has been read to stand in the record.

Q. (By Mr. Phelps): Did you make that statement?

A. That is right.

Q. That is still true and correct, isn't it?

A. That is right." (R. 87-88)

John L. DeRosa, also called by the plaintiff, readily admitted that his testimony could not go beyond the fact that he did not know whether the wig-wag was working or not. He testified:

“Q. And you did not know whether it was working or not?

Mr. Murman: That is the same thing. Your Honor, he can only testify to what he saw, can't testify whether it was working or not.

The Court: I will allow the question. Do you know whether or not it was working?

A. As my memory serves me, I can't remember of seeing it working, no.

Q. So that answer would mean, of course, you don't know whether it was working or not, isn't that fair to say?

A. Precisely.” (R. 158-159)

If there be any doubt that the testimony of Hewes and DeRosa established nothing and that no inference could be drawn from their testimony that the signal was not working, it was set at rest by the testimony of Highway Patrol Officer Lloyd Sublett, who interviewed both Hewes and DeRosa on the day after the accident. He asked them both whether they knew whether the signal was working or not. They said they did not know. He asked them both whether they had looked for the signal. They admitted they had not looked.³⁶ The officer testified as follows:

“Q. And in the course of that investigation did Mr. Hewes tell you that he didn't know whether the wig-wag was working or not?

36. If they did not look they could not know whether the signal functioned and any claimed testimony from them would have no probative value.

A. Yes, he told me that.

Q. Did Mr. DeRosa tell you that also?

A. He also told me that he didn't know.

Q. And that he didn't look?

A. That's right.

Q. And the same is true with Mr. Hewes?

A. Yes." (R. 223-224)³⁷

This is the state of the record and it is in the face of this evidence that appellant's opening brief represents to this Court flatly, without qualification, "the wig-wag crossing signal was not working * * *" (appellant's opening brief, p. 3).³⁸

THE WHISTLE ON THE LOCOMOTIVE.

There was a contention that the whistle was not sounded by the train as it approached the crossing. It is stated as a fact by the appellant in her opening brief that "no whistles

37. On cross examination officer Sublett again testified:

"Q. Don't you also remember that when you talked to Mr. DeRosa and Mr. Hewes they said they didn't see the wig-wag operating? A. Yes.

Q. So it wasn't that they were not sure whether it was operating or not, but they didn't see it operating, is that correct?

A. They said they couldn't tell me whether it was operating or wasn't.

Q. Didn't they also say they didn't see it operating?

A. They said they didn't look.

Q. Both of them said they didn't look?

A. Mr. DeRosa or Mr. Hewes, rather, told me that he didn't see it, he didn't look. I asked Mr. DeRosa if he saw whether it was operating or not, and he said, 'No, I didn't look, either.'

Q. Both of them said they didn't look? A. Yes.

Q. But in addition to that they said they couldn't tell you whether it was operating or not?

A. That is right, they said they couldn't tell me." (R. 231-232)

38. Appellee contended on the trial (and still does) that there was no evidence to support the allegations of the complaint that the wig-wag signal was negligently maintained or operated. A motion to withdraw this issue from the jury was made (R. 518). It should have been granted.

had been heard before that [before the collision] * * *.” Again it is necessary to point out that appellant’s statement, upon which she wants this Court to act, is not supported by the record. In addition to the engineer and fireman of the passenger train who respectively sounded the whistle and bell of the locomotive, the warnings were confirmed and were **heard by two independent witnesses**, residents of the community of Anderson, and by two members of the crew on the freight train which was in on the siding.³⁹

Lela Johnson, testified that she heard the train coming, heard crossing warnings being sounded and because of this waited to watch the train as it proceeded south. Her testimony:

“Q. Now, what was that that attracted your attention to the train? Did you hear any whistles before that?

A. Well, as I was coming out my yard, I heard a train come away up the track, **and the whistle and horn was going and she was blowing and blowing** there at the crossing, you know, so when she gets down to Anderson near the station, you see, she blew a long whistle and horn. **Yes, sir, she blowed and that make me look more so**, then I kept my eyes right on her, and when I throwed my eyes to the crossing I saw this car come up and just as the car drove up on the track the train knocked it off.” (R. 469)

“Q. You heard the train when it was way down the track?

A. Yes, a good ways up the track.

Q. You heard the sound of the whistle for the Ferry Street crossing in Anderson?

39. It was also heard by Caillouette, head brakeman of the passenger train (R. 457).

A. Yes, for the Ferry Street crossing, before you got down to the Howard Street crossing." (R. 472)

On cross examination^{39a} she said that she thought that the train was about a mile up the track when she first heard it. She testified:

"Q. What did you hear about the train?

A. I just heard the rumbling of the train and I heard the whistle way up the track, seemed to me like it might be about a mile up the track.

Q. Was it a whistle you heard, a steam whistle?

A. I heard a horn and the whistle.

Q. You heard a horn and whistle?

A. Yes, sir.

Q. When you say horn, what do mean by that?

A. Well, the steam whistle it blows and the horn goes something like this: Ahhhh-ahhhh-ahhhh." (R. 481)

Alex M. Andree testified that he saw the headlights of the locomotive and heard the whistles for all the crossings in Anderson, including those north of where the accident happened. Mr. Andree had lived in Anderson for about twenty years and had known both Mr. and Mrs. Shanahan well before this accident, and Mrs. Shanahan since. His testimony:

"Q. All right. As that train came down, came into Anderson, what was it about that train that attracted your attention to it?

A. Well, the whistles." (R. 428)

39a. Mrs. Johnson's testimony came as no surprise to plaintiff's counsel, for on rebuttal he called a Mr. Wilbert G. Whitfield, who investigated the accident for the Department of Internal Revenue on behalf of the Federal Compensation Commission. Mrs. Johnson had told him on the day after the accident that she had heard the horn honking and the bell ringing as the train was approaching the crossing (R. 501-502).

"Q. Did you hear a whistle for any crossings north?

A. Another crossing above there—

Q. I am sorry—

A. (Continuing): They whistled for that crossing.

Q. What crossing is that?

A. That is the one between—there is two crossings up there between—between Spring Creek. There is one crossing this side and another crossing between the Signal Oil, the crossing there and the next crossing is North Street.

Q. All right, did you hear the train blow for those crossings? A. I did.

Q. You did. And did you hear the train blow for the other crossings in the town of Anderson?

A. Yes, he blew for North Street and the time he got down to Howard Street he opened her up again on Ferry Street, and it was still, still whistling when I walked into the house. I didn't pay much attention. I know there was a freight train to pull out, the whistle was still blowing out after he went through Ferry Street and I went inside." (R. 429)

Luther L. Griffith, conductor of the freight train, also heard the train whistling as it approached the crossing. He testified:

"Q. Did you hear any whistle in this area of the station at the crossing as the train cut off your view?

A. **The whistle was blowing continually.**

Q. Tied the cord down?

A. Placed as a crossing whistle.

Q. The whistle was being blown continuously.

A. That is with spacing of a crossing whistle.

Q. Well, I suppose by that you mean it was blown separately for each crossing, but continuously as the crossings were approached?

A. That's right." (R. 421)

George W. Thomas, the brakeman of the freight train, had walked to a point north of the North Street crossing as the train approached. His testimony as to the whistle was as follows :

“Q. And can you tell us whether or not the train as it came into Anderson and after it passed you going through Anderson, were any crossing whistles sounded? A. Yes, they were sounded.

Q. Approximately where, as you now remember, were the whistles sounded?

A. Just as he passed on through, he started sounded for the North Street crossing.

Q. For the North Street crossing?

A. Yes.

Q. And thereafter did he continue to sound whistles? A. Yes.

Q. And were any whistles sounded for any crossing north of the North Street crossing?

A. Yes.” (R. 389-390.)

Noel Caillouette, head brakeman on the passenger train, had opened the door as the train approached Anderson, to read the order board at the station. He heard the crossing signal approaching the crossing.

“Q. Now, then, did you hear the crossing whistle sounded at any time? A. Yes.

Q. And where were you when you heard the crossing signal?

A. Standing in the open door.” (T. 457)

It is in the face of this overwhelming evidence that appellant states to this Court in its brief “no warnings were seen or heard until an instant before the fatal crash occurred” (Appellant’s Opening Brief, p. 19). Again he states “no

whistles had been heard before that [the collision]" (Appellant's Opening Brief, p. 8). In the face of such testimony is it remarkable that the jury rejected appellant's argument that no warnings were sounded? Would it have been unreasonable for the jury to have found the fact to be that the whistles and bells were sounded and that in spite of the presumption of care for them to have found that he should have heard the warnings and heeded them?

Another claim of negligence made by the appellant, but not accepted by the jury, was speed of the train. There is no evidence that the speed of the train was unusual or improper or in violation of the law or of company rule.⁴⁰

Still another claim was that there was no flagman at the crossing.⁴¹ That attempt is to imply that one was customarily there but absent at the time. There was no flagman there and none was intended to be. The crossing was protected by a mechanical wig-wag signal.

Other claims made by appellant, again not supported by the evidence, are claims made in an effort to excuse the patent contributory negligence of the deceased. These claims relate to the physical conditions of the crossing and the claim that Shanahan stopped at the stop sign. The evidence, fairly viewed, will not support these claims.

THE VIEW AT THE CROSSING.

Appellant has stated in her brief that "visibility of appellee's southbound trains was obstructed by appellee's station and depot * * *" (Appellant's Opening Brief, p. 3).

40. See footnote 29, p. 8.

41. Appellant's Opening Brief, pp. 3, 19.

Again she claims that Shanahan stopped, looked, and listened before attempting to cross "at the **blind Howard Street crossing** * * *" (Appellant's Opening Brief, p. 4). Still further on in her brief appellant claims that the "deceased's view of the speeding train, when he stopped to look and listen before proceeding over the tracks at the first available crossing was obstructed by appellee's station and depot" (Appellant's Opening Brief, p. 19).

That the view was not obstructed by the crossing from a point more than 40 feet from the main line track can best be demonstrated by reference to the diagram reproduced here. Certainly it cannot be doubted that at a point 33.7 feet from the center of the main line track, where the stop sign was located, the view is perfectly clear. It is obvious that the stop sign was located by the proper California highway authority with the view up the track in mind. The sign appears to be almost directly south of the most westerly building line of the station, so that at that point the entire station building is east of the line of vision and could not obstruct any view (Defendant's Exhibit D). The photographs reproduced here also demonstrate this.

Even if the stop sign had been placed back of the station (east) appellant's claim that the crossing was blind would still be a mis-statement. The station, by actual measurement is 146.7 feet north of the crossing (R. 204). A straight edge placed on the diagram and pivoting around the southwest corner of the station will readily demonstrate the view of the driver down the main line. Assuming the very worst, at a point still in Center Street and where the Howard Street crossing starts to curve away from Center Street (a point approximately 75 feet from the main line) the

main line can be seen past the station a distance of at least 240 feet.

The jury saw the photographs, saw the diagrams, and properly concluded that this was not a blind, obstructed crossing as claimed by appellant.

THE STOP WAS NOT AT THE STOP SIGN.

On the trial plaintiff's witnesses Hewes and DeRosa attempted to say that Shanahan drove up to the crossing and stopped in the vicinity of the stop sign.⁴² This he was required by law to do and if there were any merit to the claim that he did stop at that point it would undoubtedly be stated as a fact in her Brief and added to the other extravagant claims made by appellant. It is of interest to note that appellant's brief studiously avoids stating where the stop was made.

On cross examination the witnesses Hewes and DeRosa admitted that Shanahan stopped at the bottom of the incline with his car still in the process of turning into the Howard Street crossing. It was at this point that he was seen to wipe the windshield directly in front of him. He then started up and continued on a distance, which can be scaled on the diagram,⁴³ of about 70 feet, continued in motion past the stop sign with his vision unobstructed to his right and was struck on the main line.

The place where he stopped is important. The rule is clear that the duty to look for approaching trains and to listen for them is not satisfied by looking at a remote spot, particularly where at a nearer point an unobstructed view

42. R. 62, 162.

43. Exhibit D.

can be had.⁴⁴ Appellant is caught on the horns of her own dilemma. If the view was obstructed at the point where Shanahan stopped, and this is her claim, then he must stop and look again at a point where he can see. There can be no doubt that there was such a point and that he could have seen if he had stopped at the stop sign or short of the first railroad track. This he was required to do in the exercise of ordinary care and the jury could well have agreed that he should have done so and that his conduct as described by his own witnesses was not consistent with the presumption of due care.

That he stopped at the bottom of the incline is abundantly established from the plaintiff's own witnesses. *John L. DeRosa* fixed the place where Shanahan stopped. His testimony was:

"Q. Now, as the car driven by Mr. Shanahan came to a stop, can you locate the place where that car stopped with reference to the incline there at the crossing?

A. Well, I believe that he stopped right **at the foot of the incline.**

Q. You mean—pardon me, had you finished?

A. Yes.

Q. You mean by that, the front end of his car was at the bottom of the incline? A. Yes.

Q. And so that, without regard to any other physi-

44. This rule is well established. See the following:
Pacheco v. S. P. Co., 129 Cal. App. 610, 19 P.2d 251;
Green v. Ry. Co., 138 Cal. 1, 70 P. 926;
Calif. Rendering Co. v. P. E. Ry. Co., 205 Cal. 73, 269 P. 922;
Koster v. S. P. Co., 207 Cal. 753, 279 P. 788;
Stephenson v. N. W. P. R. Co., 208 Cal. 749, 284 P. 913;
Shannon v. N. W. P. R. Co., 209 Cal. 303, 287 P. 91;
Young v. S. P. Co., 182 Cal. 369, 190 P. 36; 189 Cal. 746, 210 P. 259.

cal obstruction or any other mark you might have put on the map; your recollection there and then at the time when you observed him was he stopped with his front end at the bottom of this little incline?

A. Yes, approximately that.

Q. And that it was only after he stopped that he went up this incline to reach the grade and level of the tracks? A. Yes.

Q. In other words, when he stopped, so it will be perfectly clear, his car was on the level of the grade of Center Street itself? A. Not exactly, no.

Q. Well, it was still at the bottom of that little incline and hadn't yet gone up the grade off of Center Street, isn't that right?

A. Yes." (R. 133-134)

The Shanahan car had not yet straightened up from its turn from Center Street into Howard Street. DeRosa testified again:

"Q. He hadn't yet straightened up yet and wasn't yet parallel with Howard Street. Now, I am talking about the Howard Street crossing, not Howard Street on the other side.

A. He wasn't quite parallel with the crossing." (R. 136)

Raymond Hewes established the Shanahan stop at the same place. His testimony:

"Q. Now, as this car came to a stop, Mr. Shanahan's car, which you subsequently found out was Mr. Shanahan's car, came to a stop, can you tell us where it was with reference to the little incline or up-grade that goes from Center Street?

A. It was towards the bottom of the incline.

Q. So that the front end of his car stopped at the bottom of the incline?

A. Yes, that is about right.

Q. Yes. And a little grade going up there, and that is the grade you have reference to?

A. Yes.

Q. It was only after then he started up after having come to a stop that he went up this incline and over the tracks?

A. Sure, he went over the tracks.

Q. I understand that, but what I am getting at is, he didn't progress up this incline any amount until after he had started up after he stopped?

A. **Started from the bottom and kept a steady speed.**

Q. So that whatever other physical facts we can determine, the point that you can now fix the place where he stopped, was the front end of the car was at the bottom of that incline—

A. Just about the bottom of it, I would say, yes.”
(R. 98-99)

From plaintiff's own witnesses then it was established that the only stop made by Shanahan was at a remote place and not at the stop sign as he was required by law to do. Other witnesses who saw Shanahan as he approached the crossing before the impact observed him moving steadily without stopping from points east of the stop sign.

Luther L. Griffith first saw Shanahan's car when it was between 30 and 40 feet east of the house track. It was moving then.⁴⁵

Philip S. Kafer, fireman, placed the Shanahan car east of the stop sign when he first saw it and said that it was

45. On direct examination he had (apparently inadvertently) placed it 30 to 40 feet east of the main line (R. 400). On cross examination he corrected it to place it 30 or 40 feet east of the house track (R. 413).

moving about eight to ten miles an hour and continued on at that speed until the impact. (R. 368)

From the testimony of these witnesses it is perfectly apparent that Shanahan did not stop at the stop sign and that the only stop he made was at the bottom of the incline while still turning into the crossing. It is claimed by the appellant that the view was blind at this point.⁴⁶ This is not so but the view is more obstructed there than at the stop sign or at the first track. If the view was obstructed as appellant claims, on his theory it is submitted that the deceased was guilty of contributory negligence as matter of law in not stopping again where the view was open and clear. We are not required on this case to maintain this position for in this case the matter was submitted to the jury for its determination as a question of fact and the jury returned the only verdict it could in the circumstances.

46. The duty is "to look for approaching cars at such point and in such manner as would enable him to determine if he could proceed in safety" (*Cal. Rendering Co. v. P. E. Ry. Co.*, 205 Cal. 73, 269 P. 922). To this end, the place selected for looking must be one where looking is effective (*Green v. So. Cal. Ry. Co.*, 138 Cal. 1, 70 P. 926; *Green v. L. A. etc. Ry. Co.*, 143 Cal. 31, 76 P. 719; *Pacheco v. S. P. Co.*, 129 Cal. App. 610, 19 P.2d 251 (holding that stopping for an arterial stop sign at a point where the traveler cannot see does not satisfy the railroad crossing rule)).

"It is the duty of a traveler on a highway approaching a railroad crossing to use ordinary care in selecting a time and place to look and listen for coming trains. He should stop for the purpose of making such observation when necessary. It is his duty to use all of his faculties, and it is not enough if he merely listens, believing that the people in charge of any approaching engine will ring a bell or sound a whistle. * * * Stopping 35 feet from the crossing and trusting to his sense of hearing, when he might have obtained a clear view of the track by moving 18 feet and a few inches nearer, clearly indicates negligence. * * * A person approaching a railway track which is itself a warning of danger must take advantage of every reasonable opportunity to look and listen."

Griffin v. San Pedro etc. R. R. Co., 170 Cal. 772, 151 P. 282.

COMMENTS ON APPELLANT'S STATEMENT OF FACTS.

The facts as revealed by the record are detailed above. Many of them appellant fails entirely to mention. Her statement of facts is so inadequate as to be actually misleading. For example, according to appellant there were two eye-witnesses to the accident, Hewes and DeRosa, (appellant's Opening Brief page 4) neither of whom, according to appellant, observed the wig-wag in operation. Actually there were five eye-witnesses, three of whom actually saw the wig-wag in operation, whereas the other two, Hewes and DeRosa, only testified that they were unable to say whether the wig-wag was working or not, that they had not seen it. If one does not see a wig-wag one is unable to tell whether or not it is operating. Appellant points out that there was no flagman at the crossing. There never had been a flagman at the crossing, and the crossing was never intended to be protected by a flagman. **It was protected** by the wig-wag crossing signal. Visibility of the southbound train was not obscured. Beginning at the boulevard stop sign, where a stop had to be made, train or no train, and continuing over the house track up to the main-line there was a clear view of more than one mile.

Appellant says no whistle was heard. Five witnesses testified that whistles were given and that whistles were heard. Appellant says that no headlight had been seen before that time, but there is evidence that the headlights were on bright and were so observed by eye-witnesses.

What appellant has done is to take only the testimony of two of her witnesses, testimony which even if it is what it is claimed to be is still thoroughly contradicted and disbelieved by the jury and by eye-witnesses to the accident. Having taken this testimony only appellant then attempts

to tell this court that what her two witnesses, unbelievably by the jury, observed are the facts of the case. As a statement of facts, it is an imposition on this court.

Just why Shanahan ignored the approaching train, the appellant never satisfactorily explained. He was in control of his own movements. He was in control of his own ability to see and hear. If anything interfered with his sight and hearing the slightest precaution would have removed the trouble. If he was blind to the train it was only because he did not see the train as it approached in plain view.

II.

STATEMENT AND DISPOSITION BELOW

This case was tried in the court below sitting with a jury. All issues of fact were submitted to the jury for its determination. The jury returned its verdict for defendant and appellee, and judgment was entered on that verdict. We have above detailed the facts and the evidence at some length. On the evidence before it and on the case as a whole the jury could not have reached any different verdict than it did. It is submitted that there was, and is, in this case a complete failure of proof of any negligence on the part of defendant and appellee.⁴⁷ It is also submitted that on the

47. The charge of negligence as made by the complaint is as follows:

“* * * defendants so maintained and operated the crossing signal and vehicle warning device of defendant corporation in such a careless, reckless and negligent manner as to cause a certain locomotive and train of defendant corporation, then and there carelessly, recklessly and negligently proceeding in a southerly direction along said tracks and right-of-way, to strike and collide without warning with said automobile, * * *.” (R. 3)

There is no evidence to support any charge of negligence made by appellant. There is positive evidence that the crossing signals

evidence Ellis E. Shanahan, decedent, was guilty of contributory negligence as matter of law.⁴⁸ At the conclusion of the presentation of evidence appellee moved the court for a directed verdict. (R. 517-518) It is submitted that that motion should have been granted. It was not and the case was submitted to the jury. Appellant is now in no position to complain because the jury determined the issues against her. If by chance the jury had returned a verdict in favor of appellant such a verdict could not stand. Such a verdict would have had to be set aside on the ground of insufficiency of the evidence to suport a finding of negligence against appellee,⁴⁹ and on the further ground that decedent was guilty of contributory negligence as matter

were operating properly, warning signals were properly given, and the train was otherwise properly operated in a careful and prudent manner. After denial of appellee's motion for directed verdict, appellee moved separately to withdraw from the jury the issues of negligence in the operation and maintenance of the crossing signal and negligence in the operation of the train (R. 518). It is submitted each of these motions should have been granted.

48. There was no room for any presumption of due care by decedent. Plaintiff's and appellant's own witnesses, DeRosa and Hewes, testified fully and in detail as to decedent's conduct. *Speck v. Sarver*, 20 C.(2d) 535; *Westburg v. Willde*, 14 C.2d 360; *Smellie v. Southern Pacific Co.*, 212 Cal. 540; *Rogers v. Interstate Transit Co.*, 212 Cal. 36; *Mar Shee v. Maryland Casualty Corp.*, 190 Cal. 1. Every case cited by appellant in her opening brief states the rule that under such circumstances any such presumption is dispelled as matter of law. The testimony of DeRosa and Hewes shows, as matter of law, that decedent was guilty of negligence by proceeding onto the tracks in front of the moving train without stopping, looking or listening at a place of safety and from which the view was unobstructed. Aside from the evidence produced by appellant, the evidence of appellee, uncontradicted and unimpeached, overwhelmingly shows contributory negligence of decedent as a matter of law.

49. There was no substantial evidence to support such a finding. Certainly there was not such a preponderance of the evidence as is required for the proof of any issue.

of law. On the other hand, it cannot be doubted that the verdict of the jury for the defendant and appellee is amply supported by the evidence, as appellant concedes on page 2 of her opening brief.

Of what, then, is appellant now complaining? She claims error in the instructions and error in the exclusion of testimony. At best the error claimed is of a highly technical nature. Under the applicable law and the facts of this case, the jury could not have reached any verdict different than they did. Assuming error as urged by appellant (and we earnestly deny any error as will appear below), such error could not have been prejudicial. On the whole case, considering all of the evidence, and considering the instructions as a whole, the jury could not have properly reached any different verdict and the verdict and judgment are manifestly right. There has been no miscarriage of justice. The cases are legion that where a decision or judgment is manifestly right and the error has not resulted in a miscarriage of justice, and where it cannot be said that without such error the verdict probably would have been different, the verdict and judgment will not be disturbed. It must appear not only that the trial court committed error but that the jury erred. We cite only a few of the many cases.⁵⁰ *Lawrence v. S. P. Co.*, 189 Cal. 434; *Saltzen v. Associated Oil Co.*, 198 Cal. 157; *People v. Estorga*, 206 Cal. 81; *Palmer v. James Granger, Inc.*, 4 C2d. 668; *Shuey v. As-*

50. For cases in which error in instructions regarding the presumption of due care was found, and in which it was held the error was not prejudicial and not grounds for reversal, see *Speck v. Sarver*, 20 C.2d 585; *Tuttle v. Crawford*, 8 C.2d 126 (1936); *Paulsen v. McDuffie*, 4 C.2d 111; *Rogers v. Interstate Transit Co.*, 212 Cal. 36; *Roselle v. Beach*, 51 C.A.2d 579; *Collier v. Los Angeles Ry. Co.*, 60 C.A.2d 169; *Persson v. James Griffiths & Sons*, 85 C.A.2d 672.

bury, 5 C2d. 712; *Tuttle v. Crawford*, 8 C2d. 126; *Radisich v. Franco-Italian P. Co.*, 68 CA2d. 825; *Wood v. Moore*, 64 CA2d. 144; *Vitali v. Straight*, 21 CA2d. 253.

As was said in *People v. Estorga*, above, at page 85:

“If it appears to our satisfaction that the result was just, and that it would have been reached if the error had not been committed, a reversal or a new trial is not to be ordered.”

In *Shuey v. Ashbury*, above, the court said:

“It is now settled law that a judgment will not be reversed by reason of an erroneous instruction, unless upon a consideration of the entire case, including the evidence, it shall appear that such error has resulted in a miscarriage of justice. The usual consequence is, that there will be no cause for reversal unless the evidence indicates that without such error in the instructions the verdict probably would have been different from the verdict actually returned by the jury.”

Even if the evidence does not go so far as to have required a judgment for defendant as matter of law, still on the whole case the jury could not reasonably have found otherwise than it did and any assumed error as urged by plaintiff is immaterial.

But there was no error either in the instructions or in the exclusion of testimony. The matters now urged by appellant will be discussed in the same order as they appear in her opening brief.

III.

**CLAIMED ERROR IN INSTRUCTIONS TO THE JURY
REGARDING PRESUMPTION OF ORDINARY CARE**

Appellant assigns as error the giving of an instruction requested by appellee (R. 542-543), and contends that it is inconsistent with the instruction given at the request of the appellant immediately preceding the instruction complained of (R. 542), respecting the presumption that Shanahan exercised ordinary care. The presumptions here in question are statutory and found in California Code of Civil Procedure § 1961 and § 1963. § 1963 provides as follows:

“All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be contraverted by other evidence. The following are of that kind:

* * * * *

4. That a person takes ordinary care of his own concerns;

* * * * *

33. That the law has been obeyed; . . .”

The position now urged by appellant, and the position that appellant now wants this court to adopt, is expressed in her opening brief to the effect that the presumption that Shanahan was exercising ordinary care and was obeying the law **“is a presumption that does stand in the face of testimony which overcomes it . . . to instruct that the presumption cannot stand in the face of testimony which overcomes it I submit is erroneous”** (Appellant’s Opening Brief, page 10) (Emphasis added). We submit that on its face the argument of appellant is untenable. To say that a presumption will stand even though “overcome” is a con-

tradiction of words.⁵¹ *Webster's New International Dictionary* defines "overcome, v. t." as "to get the better of, to surmount, conquer, subdue." From the simple meaning of the words used it obviously cannot be error to instruct the jury that if the presumption were "overcome" it could not stand. Possibly appellant would place a different meaning on the word "overcome." Certainly we cannot assume that the jury understood the word to mean anything different than its ordinary or customary meaning. It is submitted that to accept the argument of appellant would be to make the presumption conclusive. The simple answer is that the statute creating the presumption expressly states that it is not conclusive, that it is a disputable presumption, and may be controverted by other evidence (California Code of Civil Procedure, § 1961 and § 1963).

The instructions given by the court touching the presumption in question are as follows:

"The law presumes that Ellis E. Shanahan, now deceased, in his conduct at the time of and immediately preceding the accident in question, was exercising ordinary care and was obeying the law. This presumption is a form of prima facie evidence and will support findings in accordance therewith in the absence of evidence to the contrary. Other evidence, if any, which the jury finds conflicts with such presumption must be weighed by the jury against the presumption, and any evidence which may support the presumption, to determine which, if either, preponderates. Such delibera-

51. Regarding the presumption that appellee exercised ordinary care and obeyed the law, the court instructed the jury "This presumption is evidence for the defendant and it remains as evidence in the case until *met or overcome* by other evidence, if any" (R. 530). (Emphasis added.) This instruction is not assigned as error.

tions, of course, shall be related to and in accordance with the Court's instructions as to the burden of proof." (R. 542)⁵²

"Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly, without an inference or presumption, and which in itself, if proved, conclusively establishes the fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, although true, does not of itself conclusively establish the fact in issue, but which affords an inference or presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences. *A presumption is a deduction which the law expressly directs to be made from particular facts, unless declared by law to be conclusive, it may be contraverted by other evidence, direct or indirect; but unless so controverted the Jury is bound to find in accordance with the presumption.*

"An inference is a deduction which the reason of the Jury draws from the facts proved. It must be founded on a fact or facts proved, and be such a deduction from those facts as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business or the course of nature." (R. 568-569) (Emphasis added.)

The two above instructions were given at the request of appellant, and the second of the above two was given after the jury had been first charged and appellant had objected

52. The giving of this instruction, requested by appellant, was objected and excepted to by appellee (R. 563-564). The facts proved by appellant's own witnesses, Hewes and DeRosa, are irreconcilable with any presumption of due care and such presumption was dispelled and disappeared from the case as matter of law. (See footnote 48, page 32, above.)

and excepted to the failure to give such instruction. (R. 560, 561) The jury was then called back and further instructed as above set forth. (R. 568) The instruction given at the request of appellee as to which error is now assigned must be read and understood in the light of the above two instructions given at the request of appellant. The instruction complained of is as follows:

“You are instructed that such a presumption cannot stand in the face of testimony which overcomes it. If the presumption has been overcome by testimony it passes out of the case. In addition, this presumption exists only in the absence of proof of the facts. If in this case you determine from the evidence what the facts and circumstances of this accident were, and what the person injured actually did, then you must determine whether or not he exercised the care and vigilance for his own safety which the circumstances required, by a consideration of the facts as you find them, and without regard for any presumption that care was exercised. If you find the actual fact as to what the person who was injured did, there is no room for any presumption as to what he did or for any presumption that he exercised care.” (R. 542-543)

The above instruction is correct in every respect. Standing alone, the jury could not have been misled, its meaning is clear and simple. There is no inconsistency between any of the instructions. Certainly when all of the instructions were read as a whole there could be no misunderstanding.⁵³

53. The court further instructed the jury as follows:

“I express no opinion as to the facts or the evidence. Nor do I wish you to understand or conclude from anything I may have said during the trial, or in the course of my instructions, that I have intended directly or indirectly to indicate any opinion on my part as to the facts or as to what I think your finding should be.

Assuming *arguendo* that the instruction complained of is technically incorrect, it cannot be questioned that any misconception or misunderstanding that the jury might have had was cured and set at rest by the last instruction given to the jury at the request of appellant which expressly told the jury that the presumption "may be contraverted by other evidence, direct or indirect; but unless so contraverted the jury is bound to find in accordance with the presumption" (R. 568).

Preliminary Matters.

We repeat, because obviously appellant has either overlooked it or studiously avoided it, this case was submitted to the jury on all issues. It was not determined as matter of law. It was not determined on motion for non-suit or on motion for directed verdict (although we contend it could have and should have been). The court did not instruct that the presumption of due care had been overcome as matter of law.⁵⁴ It was left for the determination of the jury whether or not the presumption was overcome by the evidence. In every case cited by appellant in her opening brief the court recognizes that unless the presumption is dis-

Ladies and gentlemen, you and you alone must decide the facts. In your deliberations you must wholly exclude any sympathy or prejudice from our minds." (R. 520)

"If in these instructions any rule or idea be stated in varying ways, as for example, that you are to find for one of the parties if you find certain facts to be true, no emphasis thereon is intended and none must be inferred. You are not to single out any certain sentence or any individual point or instruction and ignore the others. You are to consider all of the instructions as a whole and regard each in the light of all the others." (R. 522)

54. The court could have and should have. The instructions requested by appellant regarding the presumption of due care should not have been given. Any such presumption was dispelled as matter of law.

pelled as matter of law, it is for the jury's determination whether or not the presumption will stand or has been overcome. The jury made such determination in this case. Every case cited by appellant in her opening brief is authority for the action of the trial court in this case in submitting the issue to the jury.⁵⁵ Every case cited by appellant in her opening brief is authority that there was no error in the instructions in this case. We could rest our argument on the authorities cited by appellant. It is perfectly clear that the only cases in which there has been a reversal on the basis of this presumption were cases in which the matter was determined by the court as matter of law, on motion for non-suit or motion for directed verdict, and those cases are distinguishable and inapplicable here.⁵⁶ This case was submitted to the jury and the determination was made by the jury.

We, of course, do not know whether the jury based its verdict on a finding that appellee was not negligent or on a finding that Shanahan was contributorily negligent. We submit, on the evidence, the jury must have found on both grounds. Assuming error as now urged by appellant, such error would, of course, go only to the question of contributory negligence. Assuming that the jury found in accordance with the presumption that Shanahan was not negligent, that could be no basis for a finding that appellee was

55. Every case cited by appellant in her opening brief is authority that here the presumption of due care was dispelled as matter of law.

56. No case has been cited by appellant, and we are confident she can find none, in which a judgment was reversed in favor of a party invoking the presumption where the issue was presented to the jury for its determination. In every case the reversal is on the ground that the issue should have been submitted to the jury, as was done here.

negligent. There is no substantial evidence from which the jury could have found that appellee was negligent. On that issue appellant is aided by no presumption. Certainly the preponderance of the evidence is in favor of the finding that appellee was not negligent.

Argument.

By the instruction requested by appellant the jury was told that the law presumes that Shanahan exercised ordinary care and obeyed the law, and that the presumption is evidence to be weighed by the jury against any conflicting evidence, and it was for the jury to determine which, if either, preponderated. It was immediately after that instruction that the complained of instruction was given. The jury could not have been misled, there could have been no misunderstanding. The jury was told the presumption did exist and it was its determination where the preponderance lay. Certainly the jury could not have understood that in the next breath the court was instructing that the presumption did not exist and that they were not to consider the presumption in determining the preponderance. The court did not so instruct. To attempt to place such construction on the court's instruction would be contrary to good sense, good logic, and the common understanding of men.

If any member of the jury could have been misled or could have had any misconception there can be no question that the further instructions of the court removed any possible doubt. After the charge had been completed the jury was excused for the purposes of objections and exceptions by the parties to the charge. The jury was then recalled and at the request of appellant was further instructed that the presumption was evidence and unless contraverted by

other evidence the jury was bound to find in accordance with the presumption. Certainly by this instruction the jury must have understood that it was for its determination whether or not the presumption had been "contraverted by other evidence" (R. 568). This instruction was requested by appellant. Coming as it did as the last instruction to the jury, and separate and apart from the other instructions and after an interval of time it must have carried particular emphasis in the minds of the jurors. In clear and precise language as requested by appellant, the jury was told it was for it to determine whether or not the presumption was to stand or was "overcome." It was for the jury to determine, considering the presumption as evidence, where the preponderance lay. This is squarely in accord with every case cited by appellant.

But even standing alone, without regard to any other instruction, the instruction complained of is proper and correct. The instruction, of course, must be read as a whole, isolated phrases and sentences cannot be dissected from it to show error. By the instruction the jury was told that if the presumption were overcome it passed out of the case. Further, the jury was told that if it found the actual facts and what decedent actually did, there was no room for any presumption as to those facts or as to what decedent did. The jury was not told that the presumption was overcome. The jury was not told, as implied by appellant's argument, that the presumption was overcome merely by the existence of conflicting evidence. The jury was told that it was for its determination whether or not the presumption were overcome.

The presumption of due care is a disputable presumption (Code of Civil Procedure § 1961 and § 1963). Every

case cited by appellant recognizes and holds that the presumption is disputable. This means that the presumption may be disputed by other evidence. If it may be disputed, obviously it may be "overcome" by other evidence.⁵⁹

A disputable presumption is a substitute for the proof of facts.⁶⁰ The purpose and reason for raising the presumption is because of the absence of proof of the facts. If the facts are proven the basis for the presumption is gone and there is no room for the presumption.⁶¹ Whether or not the facts were proven is for the determination of the trier of fact. If the trier of fact makes such determination and finds that the facts have been proven the presumption then passes out of the case.⁶² The trier of fact in reaching its determination of the proven facts must weigh conflicting evidence to determine where the preponderance lay. In weighing the evidence the trier of fact is to consider as evidence the presumption, so that there is on the one hand the presumption and any evidence in support of the presumption, and on the other hand the conflicting evidence.⁶³ If the

59. Here it was "overcome" as matter of law. The testimony of appellant's own witnesses, DeRosa and Hewes, left no room for the presumption. (See footnote 48, page 32, and footnote 52, page 37.)

60. *Speck v. Sarver*, 20 C.2d 585; *Simonton v. Los Angeles T. & S. Bank*, 205 Cal. 252; *Williams v. Hasshagen*, 166 Cal. 386; *Hughes v. A. T. & S. F. Ry. Co.*, 121 Cal. App. 271.

61. *Westburg v. Willde*, 14 C.2d 360; *Paulsen v. McDuffie*, 4 C.2d 111; *Rogers v. Interstate Transit Co.*, 212 Cal. 36; *Williams v. Hasshagen*, 166 Cal. 386; *Clary v. Lindley*, 30 C.A.2d 571; *Dull v. A. T. & S. F. Ry. Co.*, 27 C.A.2d 473; *Maryland Casualty Co. v. Little*, 102 Cal. App. 205.

62. *Smellie v. Southern Pacific Co.*, 212 Cal. 540, and cases cited in footnote 61 above.

63. In *Smellie v. S. P. Co.*, 212 Cal. 540, in discussing the effect of contradictory evidence on the presumption, the court said at page 553: "In such case their [presumptions] guiding and com-

trier of fact finds in accordance with the conflicting evidence, the presumption, just as the evidence in support of the presumption, has served its full purpose and passes out of the case.⁶⁴ On the other hand if the jury find in accordance with the presumption and its supporting evidence, if any, again the presumption has served its purpose, and the presumption, as evidence, will support the findings of the jury.

In *Clary v. Lindley*, 30 CA(2d) 571, 573, the court said:

elling effect is undermined and diminished or destroyed to the extent that they are controlled by the facts as found to exist."

In *Beers v. California State Life Insurance Co.*, 87 Cal. App. 440, the court said at page 464: " * * * a presumption is evidence (Code Civ. Proc. secs. 1957-1961), and that, while as against a proved fact, or a fact admitted, a disputable presumption has no weight, yet, where it is sought to prove the fact against the presumption, it still remains with the jury to say whether or not the fact has been proved, * * *."

64. The presumption is evidence but is no better or stronger than any other evidence. In fact, it has been repeatedly held that a disputable presumption is the weakest and least satisfactory evidence. *Beers v. California State Life Insurance Co.*, 87 Cal. App. 440.

In *Simonton v. Los Angeles T. & S. Bank*, 205 Cal. 252, the court said at page 258:

" * * * Disputable inferences or presumptions, such as appellants here rely upon, have been said to be the weakest and least satisfactory character of evidence (*Savings & Loan Soc. v. Burnett*, 106 Cal. 514 [39 Pac. 922]). They are allowed to stand, not against the facts they represent, but in lieu of proof of them. When not controverted, however, the court or jury is bound to find according to the presumption. When controverted by other evidence, whether direct or indirect, an issue of fact is raised which it is the duty of the court to determine as in other cases, and its conclusion is conclusive upon an appellate court unless it be manifestly without sufficient support in the evidence (*Fanning v. Green*, 156 Cal. 279 [104 Pac. 308])."

In *Anderson v. Southern Pacific Co.*, 129 Cal. App. 206, the court points out that to overcome the presumption "evidence sufficient only to balance the presumption need be introduced to overcome it," it is not required that it be overcome by a preponderance of the evidence.

“‘A disputable presumption is a substitute for proof of facts. It is a species of evidence that may be accepted and acted upon when there is no other evidence to uphold the contention for which it stands.’ (*Noble v. Key System, Ltd.*, 10 Cal. App. (2d) 132, 137 [51 Pac. (2d) 887].) It may be contraverted by evidence. (Code Civ. Proc., sec. 1961.) It is dispelled when evidence is produced by the party or his witnesses covering the subject of the presumption. (*Rogers v. Interstate Transit Co.*, 212 Cal. 36 [297 Pac.(2d) 914].) When there is a conflict in the evidence introduced by opposing parties, there is no room for the presumption (*Kelly v. Fretz*, 19 Cal. App. (2d) 356 [65 Pac.(2d) 914]), for the simple reason that one side or the other would be forced to introduce evidence to controvert other evidence, plus a presumption.” (*Paulsen v. McDuffie*, 4 Cal.(2d) 111 [47 Pac.(2d) 709]; *Mundy v. Marshall*, 9 Cal.(2d) 294 [65 Pac.(2d) 65].)

The argument of appellant is bottomed on the case of *Smellie v. Southern Pacific Co.*, 212 Cal. 450.⁶⁵ That was an appeal from a judgment entered on a directed verdict in a death case. The case is clearly distinguishable for the reason that the question was presented and decided under the rules applicable to non-suit and directed verdict, and any evidence produced by defendant was eliminated from consideration. The question in the *Smellie* case was simply whether or not the presumption had been dispelled as matter of law. The opinion of the court clearly distinguishes

65. The court recognizes the rule that testimony on behalf of the party invoking the presumption as to the actual facts will dispell the presumption as matter of law, and the court goes on to say, at page 552, “* * * but it does not necessarily follow that the presumption may not be overcome or ‘dispelled’ as a matter of law by proof of the party against whom the presumption is invoked.”

the case where the question is presented to the trier of fact. The case recognizes that the presumption is a disputable one and may be overcome and also that if the facts are proven or if the jury finds the actual facts there is no room for any presumption. The case is authority for the action of the trial court in this case.

Appellant quotes on page 29 of her opening brief the case of *Westburg v. Willde*, 14 C.2d 360, that the presumption shall stand "until and unless it is overcome by satisfactory evidence." This identical language appears in a number of the other cases cited by appellant. Appellant in her argument makes some point of the use of the word "testimony" in the instruction complained of. The cases cited by appellant used the words "evidence" and "satisfactory evidence." "Testimony" is "evidence," and is "satisfactory evidence."⁶⁶ The cases all hold that the presumption may be "overcome" by "evidence" and "satisfactory evidence." The presumption may be "overcome" by "testimony." We submit the instruction could not have more clearly followed the cases cited by appellant even by direct quotation. The meaning of the language used is identical and the jury could not have misunderstood it.⁶⁷ To elimi-

66. The term "testimony" is, of course, more restricted than the term "evidence." "Testimony" is only one form of "evidence." Here the physical facts and circumstances, "evidence," weighed as heavily in favor of appellee as the "testimony," and we submit that if either party is in a position to object to the use of the word "testimony" in the instruction it would be appellee, not appellant.

67. Appellant attempts to make something from the use of the word "injured" in the instruction and suggests that the word should have been "killed." Certainly one who dies as the result of an accident has been "injured," and appellant, in her complaint, alleges that decedent received and sustained "serious bodily injuries, from which injuries said Ellie E. Shanahan died" (R. 3).

nate any doubt the instruction given by the Court at appellant's request after the objections and exceptions to the charge and when the jury was recalled, uses the term "evidence."

Appellant also relies very strongly on the case of *United States v. Fotopulos*, 180 F.2d 631. That was a case in which the trial court, sitting without a jury, had found that the decedent had exercised due care, and the court of appeals merely held that the presumption of due care was available to support this finding. The result cannot be questioned but the case has no applicability here. As pointed out by the court in the *Fotopulos Case*, at page 638, "* * * the question is one for the jury." Here the question was submitted to the jury.

In the final analysis appellant's argument is that in a death case, where decedent is not available to testify, the presumption that decedent used due care is indisputable and conclusive. That is not the law, and the cases cited by appellant do not so hold. The cases cited by appellant hold that, unless it can be said that decedent was guilty of contributory negligence as a matter of law, the jury should be instructed on the presumption of due care. The jury in this case was so instructed. The cases cited by appellant hold further that it is for the jury's determination whether or not that presumption has been "overcome." The jury in this case was so instructed. Appellant would argue that the instruction complained of told the jury that the presumption was overcome as matter of law. It did not. The instruction told the jury only that *if* the jury should find that the presumption were "overcome," and that determination was theirs alone, then they could no longer con-

sider the presumption. This is squarely in accord with the cases cited by appellant.

The conclusive answer to appellant's contention, and to her entire case, is that the presumption of care on the part of a motorist, in circumstances such as here, has been uniformly held to be rebutted as a matter of law. The deceased driver of an automobile may be held to be guilty of contributory negligence as a matter of law in railroad crossing cases. The cases hold that under the law of railroad crossings, due care of the driver is measured by established standards of conduct. If the driver does not stop, look and listen, or doing so fails to see or hear, he is held to be contributively negligent and there is no room for the presumption.

There are many cases where the presumption of due care of a deceased has been urged in support of a verdict, the contention being made that the presumption created a conflict. In these cases it is held that the presumption is dispelled—and verdicts for the plaintiffs have been reversed or non-suits and directed verdicts for defendants affirmed.

The following cases are death cases—actions for wrongful death—in each of which the highway traveler was killed at a railroad crossing, and in each of which it was held, regardless of the presumption of due care, that the deceased driver did not exercise care and that the action was barred by the defense of contributory negligence as a matter of law. The following cases were all decided since the *Smellie* case, and in the light of the rule of the *Smellie* case:

Heintz v. S. P. Co., 63 C.A.2d 699 (hr. den.) Non-suit affirmed;

Dull v. A., T. & S. F. Ry. Co., 27 C.A.2d 473, Directed verdict for defendant affirmed;⁶⁸

Pacheco v. S. P. Co., 129 Cal. App. 6101, Non-suit affirmed.⁶⁹

Fridde v. S. P. Co., 126 Cal. App. 388, Judgment for plaintiff reversed.

Hughes v. A., T. & S. F. Ry. Co., 121 Cal. App. 271 (hr. den.) Judgment for plaintiff reversed.

Rowe v. So. Cal. Ry. Co., 4 Cal. App. 1, Non-suit affirmed.

68. The court said at page 477:

“* * * From the facts as they are contained in the record, it appears that the deceased approached an open railroad crossing with a clear view of the tracks in both directions from a point sixty feet away from the crossing; that as she approached the railroad tracks she slowed down to about two miles per hour, and then drove up a short incline and onto the tracks, where she was struck by the train. Driving an automobile which the appellant, who was the owner thereof, testified could be stopped within twelve or fourteen feet when going twenty miles per hour, and within about nine feet when going twelve or fifteen miles per hour, we find the deceased, according to the evidence, going twenty miles per hour when within five hundred feet of the crossing in question, and at a much slower speed for the last sixty feet, with an unobstructed view, still continuing to drive up to and upon the track in the face of the fast approaching train. With this picture, it would be idle to attempt to show ordinary care or prudence upon the part of the deceased. As a matter of fact, in order to justify the conduct of the unfortunate decedent, we would be first compelled to overrule every known California case involving accidents at railroad crossings. Appellant relies largely upon an indulgence of the presumption of ordinary care and diligence on the part of decedent from all the circumstances of the case and the natural instinct of self-preservation—and contends that because thereof the motion for a directed verdict should have been denied. However, this presumption arises only in the absence of direct proof of the facts. The circumstances of this case alone are sufficient to rebut the presumption claimed.”

69. Holding that stopping for an arterial stop sign at a point where the traveler cannot see does not satisfy the railroad crossing rule.

In *Hughes v. A., T. & S. F. Ry. Co.*, 121 Cal. App. 271, 277, the court considers the rule in the light of the *Smellie* case, finds no disagreement between the two and concludes the presumption of §1963 does not raise a conflict. The court says:

“When the evidence is undisputed that the view of the deceased was unobstructed so that if she had looked she could have seen the approaching train, that the noise of the train taken with the crossing signal and the ringing of the bell was so great that if she had listened she could have heard, and that if she had stopped at any point within the 70 feet of approach to the tracks she could have discovered the approaching train in time to avoid injury, there is no fact in evidence upon which a presumption could be founded that she was taking ordinary care of her own concerns at the time. On the other hand there is strong presumption that if she had looked she would have seen and if she had listened she would have heard the approaching train (*Young v. Southern Pac. Co.*, 189 Cal. 746, 754 [210 Pac. 259]; *Cate v. Fresno Traction Co.*, 213 Cal. 190 [2 P.2d 364].) In such a case the weight of the presumption of ordinary care as evidence is precisely the same as the weight of testimony which is so unreasonable and improbable that the appellate court will say that it does not constitute a substantial conflict.”

Appellee respectfully submits that in this case decedent was guilty of contributory negligence as matter of law. Certainly appellant cannot be heard to object where the jury was fully and properly instructed that decedent is presumed to have used due care, and the question of the contributory negligence of decedent was left solely for the jury's determination.

Only one other comment need be made. On pages 26 and 27 of her opening brief appellant makes reference to certain other instructions given by the Court. There is no claim that any of the referred to instructions are improper or incorrect, and no error is assigned to the giving of any of them. There can be no question or dispute that each of the referred to instructions is proper and correct (although in several instances appellant's paraphrasing of the instructions is inaccurate). No further comment is required.

IV.

CLAIMED ERROR IN THE EXCLUSION OF TESTIMONY

Appellant claims error in the ruling of the Court in striking from the record testimony of witness Tolson, called by appellant on rebuttal (R. 513). The testimony stricken referred to a claimed failure⁷⁰ of the wig-wag signal on a single occasion some thirty days prior to the date of the accident, while the signal was being tested by Signalman Rowe, who had been called as a witness for appellee. As indicated, the testimony referred only to an occasion thirty days prior to the accident.

At the outset there would seem to be no question that the exclusion of the proffered testimony, whether proper or improper, would be entirely immaterial if in fact the wig-wag signal was operating at the time of the accident. Appellant states in her opening brief, p. 38, that she had "proved" the wig-wag crossing signal was not working. The statement is entirely without support in the record. The first reference to the record referred to in appellant's

70. The testimony stricken did not relate to a failure. This is discussed below.

opening brief in support of her flat statement that the wig-wag crossing signal was not working is to the testimony of witness Tommy A. Hendrix, pp. 34 and 36 of the record.⁷¹ This witness's testimony established no more than that 10 to 15 minutes before the accident he had driven over the crossing, there was no train coming, and the wig-wag then, quite properly, was not working.⁷² We do not propose to repeat the evidence or facts as set out above, pp. 3-30, but submit that there is no probative evidence from which the jury could have found that the signal was not working at the time of the accident. There is positive evidence, uncontradicted, that the signal was properly operating. At best, the only evidence offered by appellant touching the issue of the operation of the wig-wag signal was the negative testimony of witnesses DeRosa and Hewes. As pointed out above, the substance of the testimony of both DeRosa and Hewes was only that they did not know whether the signal was working or not, and both admitted to Police Officer Sublett shortly after the accident that they were not looking for the signal.⁷³ It cannot be doubted that before the negative testimony of a witness that he did not see a signal can be given any probative value on the question of whether or not the signal was operating, it must appear not only that the witness was so situated that he could see but

71. Other references relied on by appellant refer only to the testimony of Hewes and DeRosa which as pointed out above, had no probative value on this point.

72. After crossing the tracks Hendrix turned north and passed the train involved in the accident when it was five miles south of Redding (R. 36-43). Redding is approximately 11 miles from Anderson.

73. See pp. 17-18 below.

also that his attention was so directed that he would have seen if the signal had been operating.

Koster v. S. P. Co., 207 Cal. 753;

Shannon v. N. W. P. R. Co., 209 Cal. 303;

Lupes v. City of Los Angeles, 10 C.2d 476;

B. & O. R. Co. v. Baldwin, 144 Fed. 53 (C.C.A. 6);

Stitt v. Hvidekoper, 17 Wall. 385, 21 L.ed. 644;

Penn R. Co. v. Swartzel, 17 F.2d 869 (C.C.A. 7);

Chicago etc. Ry. v. Sellars, 5 F.2d 31 (C.C.A. 8).

In *Chicago etc. Ry. Co. v. Sellars*, 5 F.2d 31, 33, the Court said:

“The record discloses that the several witnesses who testified for the railroad company as to whether the locomotive headlight was burning, the bell rung, and the whistle blown, were in a position to see and hear, and their evidence is of a positive character, while the witnesses for the plaintiff were not so situated and *were not giving attention to these matters*; so no issue requiring the submission of these questions to the jury was made.” (Emphasis added).

There is not a scintilla of evidence to support the claim that the wig-wag signal was not operating. It is submitted that on the record this issue should not have been submitted to the jury. As matter of law there was a complete failure of proof. In the circumstances the exclusion of the proffered testimony was wholly immaterial.

If it cannot be said that as matter of law there was a complete failure of proof on this issue, certainly on this record it cannot be doubted the great preponderance of the evidence was that the signal was properly operating. The positive testimony, from both independent and em-

ployee witnesses, has been detailed above at pp. 11-18 and will not be repeated. It cannot be doubted that on the whole case the jury could have reached no different conclusion than that the signal was operating. Assuming *arguendo*, therefore, error in striking the testimony of Tolson, such error could in no sense be considered prejudicial, and any such assumed error could be no ground for reversing the verdict of the jury.

There was no error in striking the testimony of Tolson.

The Facts.

Appellant claims error in striking the testimony of Tolson on the ground that such testimony contradicted the testimony of Rowe and was material to show knowledge of appellee that the signal was faulty. It apparently is appellant's contention that the testimony stricken was offered for the dual purpose of impeachment of witness Rowe and on the issue of negligence. The testimony was inadmissible for either purpose.

The stricken testimony must be placed in its proper setting. Witness Rowe was called by appellee. On direct examination he testified that he was employed by Southern Pacific Company as a signal maintainer in the area involved in this accident, and had been so employed for several years prior to the accident. He had inspected and tested this signal each working day from December 13 to December 27, and on each occasion found it working properly and no repairs were made. He inspected the signal at 9:20 on the morning of the 27th, about two hours after the accident. This inspection was made in the presence of the police and the coroner. At this time, the signal was

working properly and no repairs were required or made. From his experience, on the basis of the tests made immediately after the accident, nothing could have been wrong with the signal at the time of the accident, 2 to 2½ hours before (R. 277, 280-283, 287-288).

On cross examination, **over the objection of appellee**, Rowe testified that so far as he could recall, since he had been maintaining the district, this signal had never been out of order, or repaired. The only time that appellant's attorney referred to any particular instance was when he asked Rowe if it were not a fact that the signal had been out of operation an entire day three or four months before the accident. **Over the objection of appellee** the witness answered no, he did not recall that (R. 294). Appellant did not press the matter further. She did not refer to any particular instance or time, except for the one reference to a time three or four months prior to the accident. The basis of the objection by defendant was that the testimony was incompetent, irrelevant and immaterial. We submit that the objection was well taken. The testimony is entirely collateral to the issue at hand, whether or not the signal was operating at the time of the accident. The only period of time covered on the direct examination of Rowe was from December 13 to December 27. There was positive testimony that the signal operated properly on two occasions within one hour before the accident, the last occasion being 10 to 15 minutes before the accident.⁷⁴ Evidence of the condition of the signal 30 days before the accident is obviously collateral and too remote. If not remote and collateral it was for appellant to prove the relevancy of

74. See pp. 12-13 above.

the offered testimony. The Court cannot guess or speculate as to its relevancy or materiality. There was no such proof or offer of proof.

Witness Tolson was called by appellant in rebuttal. The testimony in question appears at pages 508-515 of the Transcript. Appellant's counsel asked the witness "Do you recall any occasion prior to the collision when the wig-wag signal did not operate?" (R. 508). The question was objected to as incompetent, irrelevant and immaterial and not proper rebuttal. Appellant's counsel in arguing the matter referred to the testimony of Mr. Rowe which had been elicited by appellant on cross-examination over the objection of appellee. The Court sustained the objection on the ground that it was an attempt to impeach a witness on a collateral matter (R. 511). When asked by the Court to fix the time to which he was referring appellant's attorney referred to the testimony of Mr. Rowe, on cross-examination over objection by appellee, that he did not recall an instance three or four months prior to the accident when the signal had been out of operation. The Court stated that was a collateral matter (R. 509). Appellee then enlarged on its objection on the ground that the testimony could not be impeachment of Rowe for there was no foundation to show Rowe knew about the incident referred to (R. 510). Appellant's attorney conceded that the matter referred to was collateral when he stated (R. 511):

"It would be a purely collateral issue had counsel not established that point in his own testimony and absolutely stated the signal had never been out of order during the four years."

Appellant's attorney overlooks the fact that the testimony referred to was not a part of appellee's case, but was

brought out **on cross-examination over the objection of the appellee**. Appellant's attorney then put a further question to the witness and the following occurred (R. 511-513):

"Mr. Murman: Q. Mr. Tolson, prior to the accident did you on any occasion notice that the signal stuck and remained in a position other than a vertical position after a train went by?

Mr. Phelps: Same objection, if your Honor please; it isn't proper rebuttal, wouldn't tend to impeach —

The Court: It isn't proper rebuttal. It really isn't proper rebuttal. You should have put it in at the beginning of your case, but I will allow the question if it is directed to a point that is within a reasonable time.

Mr. Murman: All right.

The Court: A day or so before or afterwards, maybe even a week.

Mr. Murman: All right, I will ask that question.

Q. Mr. Tolson, how long—

Mr. Phelps: I want to enlarge on the objection, that it is leading and suggestive.

The Court: Yes, but I will allow it.

Mr. Murman: Q. Mr. Tolson, how long prior to the date of the accident do you last remember seeing the signal in a position other than a vertical position?

Mr. Phelps: Same objection, your Honor understands, runs to this line of questioning?

The Court: Yes.

Mr. Phelps: It wouldn't tend to impeach this witness, even remotely tend to impeach the witness. He was never asked about it. No notice on the part of the Southern Pacific Company.

A. Other than through his testing, that I would say, it was within, oh, 30 days, anyway. I have seen him when he was testing, it would hold in that position where is wasn't centered.

Mr. Phelps: I will ask that go out as too remote.

Mr. Murman: Q. When did the signal get that way?

A. **When he was testing it.**

Q. You said within 30 days of the accident?

A. I would say something like that. I don't remember the exact time or date, never paid particular attention to its position, but I have seen him take the signal and test it where it wouldn't be centered, and would stick to one side or the other and wouldn't come back.

Q. That was when he was testing it?

A. **That was when he was testing it.**

Mr. Phelps: May I please—

The Court: How long before the 27th day of December was this?

A. Well, directly, a direct day I couldn't answer that only just by saying it was within 30 days, sir, or something like that. It wasn't—it didn't come into my mind exclusively just what time that would be.

Mr. Phelps: Then, if your Honor please, I ask that the answer go out as too remote even under your Honor's ruling, confined within a day or two.

Mr. Murman: I submit it is rebuttal.

Mr. Phelps: It is not rebuttal.

The Court: I am going to strike the answer and instruct the jury to disregard the testimony. It isn't rebuttal and not impeachment.

Mr. Murman: Well, I beg to differ with your Honor, and under the circumstances I have no further questions."

As appears the witness was eventually permitted to answer the question. The only problem, therefore, is whether the court properly struck the answer on the motion of the appellee. The record speaks for itself. The ruling was correct.

Argument.

The basis on which appellant offered the testimony, and the basis for her objection to its exclusion are not exactly clear. Appellant has argued that the testimony should have been admitted both as rebuttal and as impeachment of the witness Rowe.

Appellant offered no evidence on her case in chief touching the operation of the signal a month or three or four months prior to the accident. To permit such evidence for the first time on rebuttal would be contrary to the established rules for the trial of a case, and would leave appellee in the position where it could not meet such testimony. In the sound discretion of the court it was properly excluded as rebuttal.

On the issue of negligence, the proffered testimony was not, in any event, admissible. Certainly evidence that the signal had not operated on a single occasion 30 days prior to the accident would not be competent or material on the question of whether the signal was operating on the day of the accident. Particularly is this true where there was positive evidence that the signal was operating properly on the day of the accident, and had been so operating since December 13th, 14 days before the accident. There was no attempt by appellant to rebut that testimony.

Appellant has argued that the testimony was admissible to show knowledge on the part of appellee that the signal was a troublesome one. Certainly a single instance of failure 30 days before the accident would not show such knowledge.

Again is this particularly true where the only evidence in the case is that the signal operated properly subsequent

to that claimed single failure and for the 14 days preceding the accident. No effort was made by appellant to contradict that evidence. The only knowledge which could be imputed to appellee was that the signal was operating properly.

The substance of Tolson's testimony in this regard is that at some indefinite time, he paid no particular attention to the time, but about 30 days prior to the accident, while Rowe was testing the signal, the arm would not be centered but would stay to one side or the other. Such testimony could have no probative value on any issue. Assuming that while testing the signal arm would stay to one side or the other, there is nothing to show that that would be a defective condition. There is nothing to show that such condition is anything more than a part of the normal testing procedure. There is nothing to show, or from which it can even be inferred, that because the arm stayed to one side or the other during testing that it was therefore out of order. The only time the condition existed was while the signal was being tested. The only possible inference is that it was a normal result of the testing.

If it was appellant's contention that the wig-wag holding in a position other than vertical during testing would indicate a defective condition, it would have been easy for appellant to have proved this from the witness Rowe when he was cross examining him. He could have and should have put a question to him by which the foundation would have been laid for the subsequent testimony by Tolson. He failed to establish the foundation that this was not a normal incident of testing although the witness was available from whom he might have established it.

There is nothing to show that because of this condition during testing that any repairs were made. To the contrary,

the only evidence is that no repairs were made. Appellant made no offer to contradict this. To conclude from this testimony that at the time referred to, some 30 days before the accident, the signal was out of order would be the purest kind of speculation.

It should be noted that the only thing established by the stricken testimony was that when the signal was tested it held in a position other than vertical. Assuming that the jury could speculate that this meant that there was a defective condition, the only inference the jury could have further drawn was that whatever the condition was it was corrected by Rowe then and there as he was testing it. It was Rowe's duty to correct any defective condition which he found and the jury were entitled to infer that any defective condition was repaired at that time. That this is the only inference the jury could draw is further confirmed by the fact that Tolson worked daily after this incident in the immediate vicinity of the signal and never again saw it in this same condition. This should be coupled with the fact that the evidence established that the signal was working at the time of the accident, on two occasions within an hour prior to the accident and that from December 14th to 27th on regular inspections it was found to be in working order. Taking all these facts, and these were the facts the Court and the jury had before them, no inference can be drawn of any defective condition from the incident described by Tolson.

Furthermore, even assuming that from this testimony we could, by speculation, conclude that the signal was defective 30 days before the accident, there is no evidence or offer by appellant to show that that condition continued

to the time of the accident, or for any period at all. There is no evidence or offer by appellant to show that appellee had any knowledge of any defective condition aside from this one particular instance some 30 days before the accident. To conclude from this testimony that the condition continued to exist up until the time of the accident and that appellee had knowledge of that again would be the purest kind of speculation. To permit such testimony to go to the jury would invite speculation on speculation. The testimony could have absolutely no probative value. As rebuttal or otherwise the testimony was wholly incompetent, irrelevant and immaterial to any issue in the case.

It is equally clear that the testimony was inadmissible to impeach witness Rowe. It would not impeach him. Appellant offered the testimony as being contradictory to that of Rowe. There is nothing in the record to indicate that it was in any way contradictory. The condition described occurred only while Rowe was in the process of testing. There is nothing to show that it was not a normal part of the testing procedure. There is nothing to show that the condition was a defective one. Rowe did testify, on cross-examination over the objection of appellee, that at no time while he had been maintaining the signal had it been defective or had any repairs been required. The testimony of Tolson is in no way contradictory. It could be considered contradictory only by indulging the purest speculation that the condition described was a defective one.

Assuming that we could indulge the speculation and conclude that the signal was defective at this indefinite time referred to, in the sound discretion of the court, the testimony was properly excluded. Rowe had at no time been

questioned about any such particular instance. To permit such testimony at this stage in the case would have been grossly unfair and unjust to witness Rowe. If the condition described did exist, Rowe would have had no opportunity either to dispute it or to explain it. Inasmuch as the condition existed only during the testing of the signal, the only normal inference is that it was a part of the testing procedure. There was no offer by appellant to show that it was not. Rowe was not questioned about it.

Finally, as stated by the court (R. 509), the testimony was properly excluded as an endeavor to impeach a witness on a collateral matter. There can be no question that it was collateral. It referred to a time some 30 days prior to the accident. No foundation was laid or effort made to in any way tie it in to the time of the accident. It was remote in time, and whether or not the signal was defective in a single instance some 30 days prior to the accident was wholly outside the issues of this case. Appellant's counsel recognized that it was a purely collateral issue when he stated (R. 511):

"It would be a purely collateral issue had counsel not established that point in his own testimony and absolutely stated that the signal had never been out of order during the four years."

Appellant's misconception is twofold. First, it apparently is her position that because the testimony was brought out on appellant's case (which it was not) it may be impeached by contradictory evidence even though collateral. This is not the rule. A witness may not be impeached on collateral matters, irrespective of whether the collateral matters were

originally brought out on direct or cross-examination. (*People v. Wells*, 33 C.2d 330, 340).

Appellant's second misconception is that the testimony of Rowe which appellant now is endeavoring to contradict was not brought out on appellee's case, but was elicited by appellant on cross-examination over the objection of appellee (R. 288, 294). The rule is stated in 27 Cal. Jur. page 107 as follows:

"Accordingly, a party may not cross examine his adversary's witnesses upon irrelevant matters for the purpose of eliciting something to be contradicted; if he does this the answer of the witness is conclusive and may not be contradicted."

And at 27 Cal. Jur. page 148:

"It has already been seen that a party may not cross examine his adversary's witness upon irrelevant or collateral matters for the purpose of eliciting something to contradict, but that if such matters are drawn out they may not be contradicted."

"The statement of the witness must be pertinent to the issues on trial, or they cannot be contradicted."

Steen v. Santa Clara etc. Co., 134 Cal. 355, 356.

See also *Trabing v. Cal. Nav. etc. Co.*, 121 Cal. 137, 144. The rule is beyond dispute.

Furthermore, the cross-examination of Rowe, which appellant now is endeavoring to contradict, went far beyond the direct examination. The direct examination was limited to that period between December 13 and December 27, a period of 14 days prior to the accident. On cross-examination appellant went back 30 days, three or four months, and several years, again over objection. If the cross-examina-

tion goes beyond the scope of the direct examination, the party cross-examining is bound by the answers, and the witness may not be impeached as to such matters by the party eliciting the testimony. The cases are many and we cite only a few.

Trabing v. Cal. Nav. etc. Co., 121 Cal. 137, 144;

Burchley v. Silverberg, 113 Cal. 673;

Sales v. Bacigalupi, 47 C.A.2d 82 (hr. den.).

We call the court's attention to one other case. In *Steinberger v. California Electric etc. Co.*, 176 Cal. 386, 393, it was held that negligence could not be proved by proof of similar instances, that such evidence was collateral and the witness could not be contradicted or impeached regarding it. The trial court in permitting such impeachment was guilty of prejudicial error. So here negligence could not be proved by showing a single instance of a defective condition some 30 days prior to the accident. The matter is entirely collateral and inadmissible, as the trial court correctly held.

V.

OTHER CLAIMED ERRORS IN INSTRUCTIONS

The exact nature of the complaint now made by appellant to the balance of the charge to the jury is not quite clear. She apparently is complaining that the court, in the course of the charge, gave certain hypothetical instructions by which the jury was told that if they were to find certain facts their verdict must then be for the appellee. As pointed out above, page 29, the verdict in this case should have been directed for appellee either on the ground that there was a complete failure of proof of negligence or on the

ground that decedent was guilty of contributory negligence as matter of law. In the circumstances, of course, any error in any instruction is immaterial.

Even if the evidence does not go so far as to require a judgment for appellee as matter of law, still appellee's case was "so strongly proved that the jury could not reasonably have found otherwise" than it did (*Shuey v. Asbury*, 5 C2d. 712) and any assumed error in the instructions is immaterial.

But there was no error in the instructions.

As to the complaint now made by appellant there is a short and conclusive answer. On the conclusion of the charge, the court gave to each party the opportunity to make exceptions and objections (R. 560). In fact, in the face of an objection by appellant, the court further instructed the jury on its return (R. 568). As to each of the instructions of which appellant now complains no exception was taken or objection made on the trial and appellant is now foreclosed from assigning as error the giving of any such instruction. Appellant recognizes the rule and attempts to argue that there should be exception made in this case. There is no basis or reason for departing from the rule.

Both the rule and the reason for the rule are clear and obvious. Rule 51 of the Federal Rules of Civil Procedure provides:

"No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

We cite only a few of the many cases. *Teller v. Athens*, 7 F.R.D. 88 (1946); *McHugh v. Audet*, 72 F. Supp. 394 (1947); *Bernstein v. Olian*, 77 F. Supp. 672 (1948) (reversed on other grounds, 174 F.2d 880).

As the court said in the Bernstein case, above at pages 674-5:

"This charge was given without objection on the part of either of the defendants. Ems Corporation having acquiesced in having the case submitted to the jury on that basis, authority is legion, both before and since Rule 51, F. R. Civ. Proc., that it is not now free to relitigate the matter because the verdict has gone other than it had anticipated. To move for a new trial on the basis of inconsistency of the verdict when an unobjected to instruction permitted the alleged inconsistency, falls within the prohibition of Rule 51." Citing cases.

Appellant can claim no surprise as to any of the instructions, appellee's proposed instructions were presented to counsel in the early stages of the trial. Furthermore the event complied with Rule 51 of the Federal Rules of Civil Procedure and informed counsel, prior to argument, of what instructions requested by the parties would be included in the charge to the jury (R. 494-495). Any error claimed, if it were error, could have been corrected if the proper objection had been made, as was done with the first objection made by appellant to the charge (R. 560 and 568). This case falls squarely within both the rule and the reason for the rule.

But there was no error in any instruction. We submit that every instruction as to which complaint is now made is proper and correct. Appellant points to no particular in-

struction to make the claim that it is not proper and correct. She can not. Appellant is not so bold as to claim she was entitled to judgment as matter of law. The most that she can claim is that the issue of negligence and contributory negligence were for the jury's determination. We can not suppose that appellant is claiming that the jury is to determine those issues without first being properly instructed. This case was submitted to the jury on all issues, after the jury had first been fully and properly instructed.

By dissecting certain phrases from the instructions, appellant attempts to place undue emphasis on the wording used. The charge must be read as a whole and the court so instructed at the request of appellant (R. 522). Furthermore, at appellant's request, the jury was specifically instructed that they need infer no emphasis from any instruction, when the court told the jury "If in these instructions any rule or idea be stated in varying ways, as for example, that you are to find for one of the parties if you find certain facts to be true, **no emphasis thereon is intended and none must be inferred.**" (R. 522) (Emphasis added).

A complaint similar to that now made by appellant was answered by the court in *Murray v. Southern Pacific Company*, 91 CA2d. 107, at 112 as follows:

"Appellant also complains that certain instructions were argumentative and repetitious as ground for reversal. However, it is a well settled rule that errors of the trial court in instructions do not call for a reversal unless the appellate court after a review of the evidence and consideration of the entire case concludes they resulted in a miscarriage of justice. (Code Civ. Proc., § 475; Const., art. VI, § 41½; *Caminetti v. Im-*

perial Mut. L. Ins., Co., 59 Cal. App. 2d 476, 488 [139 P.2d 681].) Appellant's complaint is really a hypercritical analysis of these instructions rather than an assignment of prejudicial error. A statement of a rule of law may appear argumentative, and such statements may be repetitious because of a desire to make them clear. But that alone is not reversible error. We find no miscarriage of justice."

The real complaint of appellant seems to be that the instructions given are clear and the language used conveyed its meaning to the jury without ambiguity or possibility of misunderstanding.

CONCLUSION

No discussion of the claim made by appellant that her motion for new trial should have been granted is necessary. It is respectfully submitted that the judgment must be affirmed. It should be affirmed on the ground that decedent was guilty of contributory negligence as matter of law, and on the ground that there was no evidence of negligence on the part of defendant and appellee. There was no error either in the instructions or in the exclusion of testimony. Plaintiff has had her full day in court. The verdict and judgment are manifestly right.

Dated: December 18, 1950.

A. B. DUNNE

LOUIS L. PHELPS

DUNNE & DUNNE

Attorneys for Appellee

No. 12,593

IN THE

United States Court of Appeals
For the Ninth Circuit

NELDA SHANAHAN,

VS.

SOUTHERN PACIFIC COMPANY,

Appellant,

Appellee.

Appeal from the United States District Court, Northern
District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

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FILED

DEC 30 1950

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Appeal from the United States District Court, Northern
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APPELLANT'S REPLY BRIEF.

I.

**PREJUDICIAL ERROR IN INSTRUCTIONS TO THE JURY
REGARDING PRESUMPTION OF ORDINARY CARE.**

Appellant reiterates that the insufficiency of the evidence is not an issue except as it may apply to prejudicial errors committed by the Court, particularly as to the reversible error in ruling out the statutory presumption of ordinary care and lawful conduct which clothed appellant's decedent when appellee's train killed him. The Court instructed the jury that the presumption could "not stand in the case of testimony which overcomes it" and that

“it passes out of the case” since “it exists only in the absence of proof of the facts” and “what the person *injured* actually did” which, when proved, required the jury to determine the question of negligence “without regard for any presumption that care was exercised” as “there is no room for any presumption” (R. 542-543).

The law is clear that this is reversible error. This presumption does not pass out of the case just because just any testimony given in the case tends to overcome it. The law requires that in order to overcome the presumption, the record has to show testimony on the part of appellant's own witnesses wholly irreconcilable with the presumption. This the record completely fails to show.

In addition to the cases already cited in appellant's opening brief supporting this point, there are:

Engstrom v. Auburn Auto Sales Corp., 11 Cal.

(2d) 64, 70, 77 Pac. (2d) 1059, 1063;

Chakmakjian v. Lowe, 33 Cal. (2d) 308, 313,

201 Pac. (2d) 801, 803;

Whicker v. Crescent Auto Co., 20 Cal. App.

(2d) 240, 243, 66 Pac. (2d) 749, 751;

Roberts v. Salmon, 66 Cal. App. (2d) 22, 27,

151 Pac. (2d) 556, 559;

Duvall v. T.W.A., 98 A.C.A. 115, 119, 219 Pac.

(2d) 463, 467.

Although there is some authority taking a contrary position, it is an indefensible position unsupported by reason. Where a showing is made by plaintiff's

witnesses in a death case wholly reconcilable with the presumption, the presumption remains in the case and must be weighed by the jury. There is no possible justification for the instruction to the jury that the presumption passed out of the case. The presumption could not pass from the case or be ignored by the jury without prejudicial error resulting in consequent injustice to appellant for whose protection and benefit the presumption exists.

Appellee has cited some cases which, divorced from the facts, appear to hold that what the Court did here, although error, is not prejudicial error. However, in a death case of similar facts, the California Courts hold not that a proper instruction on the presumption may be given, but that it must be given.

Kelley v. City and County of San Francisco,
58 Cal. App. (2d) 872, 876, 137 Pac. (2d)
719, 721;

Jackson v. Utica Light & Power Co., 64 Cal.
App. (2d) 885, 895, 149 Pac. (2d) 748, 752;
Paulsen v. Spencer, 78 Cal. App. (2d) 268,
271, 177 Pac. (2d) 597, 598;

McKinley v. Southern Pac. Co., 80 Cal. App.
(2d) 301, 309-313, 181 Pac. (2d) 899, 905-
907.

It may be readily seen from the foregoing that it is improper as well as unnecessary to this Specification of Error to review, as appellee has done, the conflicting testimony of all appellee's witnesses. It is only proper and necessary to review the evi-

dence produced on behalf of appellant as designated (R. 575). The record shows that this evidence is wholly reconcilable with the presumption (A.O.B. 2-8, 20-38). In view of the state of the record, the presumption couldn't have passed out of the case though the Court erroneously instructed the jury otherwise to appellant's prejudice (R. 542-543).

On this point, appellee admits error by stating, "The cases cited by appellant hold further that it is for the jury's determination whether or not that presumption has been overcome" (A.B. 47). That is exactly what appellant is contending, but that is not the Court's instruction to the jury. Consequently, the jury couldn't have considered it in its deliberations.

Contrary to appellee's assertion, the presumption applies where the driver stops, looks and listens (*Scott v. Sheedy*, 39 Cal. App. (2d) 96, 102). Any cases cited by appellee on this point which are asserted to be to the contrary are easily distinguishable on their facts.

Appellee mistakenly asserts that since decedent "was not seen" to wipe the steam off the windshield and window to his right, "there can be no presumption that he took this precaution" (A.B., 8). Apart from the presumption of due care which applied to decedent, both Mr. Hewes and Mr. DeRosa, the only eyewitnesses to the incident, saw decedent wipe off the steam (R. 61, 78-79, 103, 118, 137) and Mr. DeRosa added that decedent "didn't seem to be in

any particular hurry to go ahead and proceed. He took quite a bit of care in wiping it off" (R. 119). As to the time taken in wiping, this occurred on cross-examination of Mr. DeRosa (R. 137):

"Q. Whatever the length of time that took?

A. A man as cautious as he was——

Mr. Phelps. Well, now, I will ask that go out and ask that the question be answered.

The Court. It will be stricken.

Mr. Phelps. Thank you, your Honor.

Q. Can you answer my question? I will reframe it. My question is: You say that it is a little difficult for you to judge time. I am trying to fix it for you another way and would you say——

A. It isn't difficult for me to judge time. I referred to distance.

Q. Oh, I see—after I believe. In any event, whatever that time takes to perform what he did, what you said, that is about the time he was stopped. Is that right?

A. I would say possible he stopped there a minute.

Q. All right.

A. *Or so.*

Q. And you came up right behind him as he stopped, did you?

A. Yes.

Q. Had him under observation the entire time from the time you first saw him at the point D-1 until he did come to a stop?

A. Yes." (Emphasis ours.)

Appellee's evidence conflicted with appellant's evidence on the fact question of warning by locomotive

whistling, bell ringing and the headlight beam, but this conflict existed solely between the evidence ad-
 duced by appellant's witnesses on the one hand, and
 that of appellee's witnesses on the other. This had
 no effect on the presumption of due care being ap-
 plicable. There was no conflict within appellant's
 evidence. Her witnesses testified that no such warn-
 ings were given until too late and just an instant
 before the crash occurred (R. 62-65, 80-81, 101, 121-
 123, 138-142, 144-145, 154-157).

Appellee asks "just why Shanahan ignored the
 approaching train" and comments "appellant never
 satisfactorily explained" this (A.B., 31). The expla-
 nation should be obvious. Deceased used and was
 presumed to have used due care. Still he had no
 warning by the faulty wigwag signal of the mile-a-
 minute approach of appellee's train running late.
 Deceased was a man in the full possession and con-
 trol of his faculties who by occupation enjoyed some
 standing in the rural community of Anderson as a
 person of above average intelligence and income (R.
 161-167, 176-184). Thus, the question as put by ap-
 pellee answers itself. Appellee's negligence explains
 Shanahan's lack of knowledge of the approaching
 train and, but for the prejudicial errors committed
 during the trial, appellant unquestionably would
 have had a verdict.

II.

PREJUDICIAL ERROR IN THE EXCLUSION OF TESTIMONY.

As it is clear in the record (R. 272-294), it is now also clear from appellee's brief that Mr. Rowe, who was not an eyewitness to the accident but merely appeared as appellee's wigwag crossing signal maintenance man, was produced on behalf of appellee to establish one point, if possible, namely, that the wigwag operated so perfectly both before and after the accident that appellee didn't know, and had no reason to believe, that it couldn't be relied on (A.B., 51-65). Two attempts of appellant to show otherwise were blocked by appellee's objections as we shall show.

Prejudicial error in striking the proffered rebuttal testimony of Mr. Tolson, who was present at the time of the accident and failed to hear the warning bell of the wigwag as did both Mr. Hewes and Mr. De-Rosa, that "*within 30 days of the accident*" he observed Mr. Rowe testing the signal and "it would hold in that position where it wasn't centered—and would stick on one side or the other and wouldn't come back" (R. 512-513) has been thoroughly covered in appellant's opening brief (A.O.B., 38-54). Appellee's artful strategy must be noted in passing however. Appellee constantly misrepresents in its brief that Mr. Tolson's observations were made "some 30 days before the accident" and asserts that only those observations which were made during the period covered by the direct testimony of Mr. Rowe between December 14th and 27th, are pertinent

rebuttal (A.B., 60-64). The record shows that Mr. Tolson's observations were made "within 30 days of the accident", including the December 14-27 period. Because of appellee's objections, appellant was not permitted to show just when they were made "within 30 days of the accident" (R. 513). Clearly, Mr. Tolson's rebuttal testimony was manifestly pertinent and it was reversible error to strike it since it would have shown that appellee knew "within 30 days of the accident" that the wigwag could not be relied on, Mr. Rowe's testimony to the contrary notwithstanding.

By ignoring appellant's evidence, appellee mistakenly asserts "there is not a scintilla of evidence—that the wigwag signal was not operating—there was a complete failure of proof" and consequently, Mr. Tolson's "proffered testimony was wholly immaterial" (A.B., 53). In this connection, appellant's Mr. Hewes, who was one of only two persons looking squarely at the signal from a short distance away behind decedent and through the dark mist towards the lights on the street beyond, testified that he didn't hear the signal's warning bell and "never seen anything except the lights across the street" (R. 64); that the wigwag signal "wasn't working. If it had been working, I could have seen it from the position I was" (R. 81). "If it was working, it should have had the red light on it, shouldn't it?—It was not working" (R. 83).

Appellant's Mr. DeRosa, who viewed the signal from behind decedent at the same time Mr. Hewes

did, also heard and saw no warning (R. 123) and he "did not see the wigwag working" (R. 158). Thus the record clearly shows that Mr. Tolson's proffered rebuttal testimony was neither remote nor collateral but vitally material because, in addition, the great preponderance of the evidence was that the signal was not operating.

Appellee again mistakenly asserts that "no effort was made by appellant to contradict" the evidence "that the signal operated properly subsequent to the claimed signal failure for the fourteen days preceding the accident" (A.B. 59-60). In good conscience, appellee can't complain of that now. In addition to Mr. Tolson's proffered testimony which was stricken, the following took place on cross-examination of Mr. Rowe (R. 294-296):

"Q. You have put in evidence here, or your counsel has, these records to show that from the 27th through to the 31st of December, 1948, you made shunt tests every day with the same results, that everything was O.K., isn't that right?

A. Yes, sir.

Q. *Don't you know two days after the accident the signal was not operating until a locomotive southbound approached right there at the Howard Street crossing?*

Mr. Phelps. Objected to, irrelevant, immaterial, what was done on other occasions.

Mr. Murman. Well, they have put it in evidence here.

The Court. That is asking something after the accident?

Mr. Phelps. After the accident.

Mr. Murman. They have put it in the record to show it was in good operating order. This goes to the evidence which they have submitted.

Mr. Phelps. If your Honor will recall my offer in this regard—if there was any question about it, I would like to have the record correctly reflect it—it was submitted, testimony, from the 13th to and including the date of the accident, the 27th, and it happens that the remaining inspections appear on the same day, but it wasn't offered to show any inspection after that.

Mr. Murman. I misunderstood the offer, then. I thought it was to show a continuous proper operation.

The Court. I consider something that happened three or four days later entirely irrelevant and immaterial.

Mr. Murman. Yes, as long as that is clear, I will not press it. I have no further questions of this witness." (Emphasis ours.)

The foregoing should make it clear that appellee did not contend that the signal worked properly after the day of the accident despite appellee's records before the jury which extended to December 31, 1948. Had any point been made to the contrary, proper rebuttal testimony was available to show that *two days* after the accident the signal failed to operate. In this connection appellee suggests that Mr. Rowe would have proved appellant's case on this point if he had been properly cross-examined (A.B. 60). However, the foregoing quotation shows that appellant would have not found it easy to prove faulty signal operation by attempting to cross-ex-

amine Mr. Rowe, an adversely interested witness who was fully protected by able counsel.

Appellee asserts that to permit Mr. Tolson's rebuttal testimony "would have been grossly unfair and unjust to witness Rowe", since "Rowe would have had no opportunity either to dispute it or to explain it" (A.B. 63). Since there is no showing that Mr. Rowe could not have been produced on sur-rebuttal had Mr. Tolson been permitted to testify, is appellee suggesting that to have produced Mr. Rowe on sur-rebuttal would have been unfair and unjust to him because, perhaps, an explanation by him could not have been made?

III.

PREJUDICIAL ERROR IN INSTRUCTIONS DIRECTING THE JURY TO FIND FOR APPELLEE.

As to this point, appellee asserts that the case should have been dismissed or a verdict directed for appellee because appellant failed in her proof and in addition decedent was guilty of contributory negligence as a matter of law. Appellee also asserts that on the record the jury had to find for appellee. These assertions are made despite the trial Court's rulings to the contrary and to the effect that a jury question was presented (R. 198, 518-519).

Ignoring this, appellee nevertheless argues that error, if any, in the instructions was immaterial and thus not prejudicial. But not being as confident as

these assertions would pretend, appellee really relies on Rule 51, Rules of Civil Procedure, to attempt to bar a consideration of appellant's contention that there was prejudicial error in sixteen instructions directing the jury to find for appellee (A.B., 65-69) with not one directing the jury otherwise.

Although appellant has covered all these points hereinabove and in appellant's opening brief (A.O.B., 54-58), replying now to fact issues since raised by appellee serves to further emphasize the soundness of appellant's position. Clearly, appellant proved her case and there is no showing of contributory negligence on behalf of decedent.

Taking the points relied on by appellant along with the applicable law, there is no basis for appellee's charge that appellant has studiously avoided consideration of facts to her disadvantage (A.B., 1). All pertinent facts have been considered (A.O.B., 2-8).

Thus, the diagram reproduced in appellee's brief (A.B., 4) should in all fairness be considered along with a similar map received in evidence as appellant's Exhibit No. 11 (R. 197). The photographs reproduced in appellee's brief (A.B., 6) in all fairness should be considered along with similar photographs received in evidence as appellant's Exhibits 3-6 (R. 48). Appellee in all fairness should admit that none of the diagrams, maps and photographs are evidence of the facts, since they fail to show how visibility was lacking due to the dark mist on that stormy

morning of the accident (R. 31, 36, 57, 72, 98, 112, 148, 172).

Although appellee admits decedent stopped, looked and listened, appellee tries to make some point of him stopping short of the stop sign (A.B., 6). Appellee asserts "that the only stop made by Shanahan was at a remote place and not at the stop sign as he was required by law to do (A.B., 28). No authority is cited for this proposition. In all fairness, appellee should admit that decedent's duty was only to stop "upon approaching" the railroad crossing and "before entering" the grade crossing (Section 577(b), California Motor Vehicle Code). While the record shows that decedent carefully obeyed the law, by doing so his view of the oncoming mile-a-minute train of which he had no warning was not only impaired by the dark mist of the stormy morning, but also by appellee's station as well as he proceeded slowly forward (Plaintiff's Exhibits 3-6, 11; R. 60-62, 70-71, 78-79, 101, 103, 116-119, 131-137, 158).

Appellee asserts "the accident was witnessed by three other persons" besides Messrs. Hewes and De-Rosa who testified for appellant (A.B., 7). Appellee contends that one of these "three other persons" is Mrs. Lela Johnson, characterized by appellee as one of "two independent witnesses, residents of the community of Anderson" (A.B., 19). The other witness is not named in appellee's brief.

First, as to Mrs. Johnson, it is noted that this colored lady is in fact not an independent witness.

Her husband is a disability pensioner of appellee and she, herself, had been employed by appellee (R. 474). Second, Mrs. Johnson had an oblique view of the accident at best some five hundred feet removed from the wigwag signal (R. 497-498). Third, her vision was obstructed by intervening buildings and trees (R. 484-486). Fourth, her attention was fastened on the speeding engine and not on the wigwag signal (R. 487). Considering all the physical facts and the limitations of one's normal faculties, it is extremely doubtful that Mrs. Johnson saw the accident or the wigwag at any time or with any clarity. Obviously, her obstructed oblique view of the scene of the accident through the misty darkness of that stormy morning, some five hundred feet away, doesn't compare with the clear view of Messrs. Hewes and DeRosa who had an unobstructed ringside seat there at the scene removed only about seventy-five feet across the tracks from the wig-wag signal itself. It must be presumed that decedent, who was closer by a few feet ahead of Messrs. Hewes and DeRosa, looked and saw no warning signal as did Messrs. Hewes and DeRosa, and, like them, received no warnings of the impending collision until an instant before when he was already trapped.

A second witness of those "three other persons" is appellee's freight train conductor, Mr. Griffiths. When the accident occurred, Mr. Griffiths was at "G-3" or near the rear platform of his caboose as shown on appellee's diagram (Defendant's Exhibit D, R. 414). This spot was more than two hundred

feet north from the scene of the accident and thrice the distance from the wigwag signal than were Messrs. Hewes and DeRosa who located themselves at "R.H. 3" and "D. 7", respectively, on appellant's map (Plaintiff's Exhibit 11, R. 64, 123). Like Mrs. Johnson, the record shows that Mr. Griffiths also was fascinated by the speeding train and didn't take his eyes off the racing engine (R. 416). In addition, while Messrs. Hewes and DeRosa were looking squarely at the wigwag from behind the decedent and saw that it wasn't working, Mr. Griffiths was north of the crossing at right angles to decedent looking at best at the wigwag's hairline profile which would have been hard enough to see in clear daylight, not to mention the misty darkness (R. 409-410):

"Mr. Phelps. I think he doesn't understand what profile is. I don't know.

Q. (by Mr. Murman). Do you know what a profile is?

A. No.

Q. I am sorry. Look at me. This is my profile.

A. Yes.

Q. Now, you are looking full at me.

A. Yes, sir.

Q. Here is a full view of the wig-wag?

A. Yes, sir.

Q. *There is a profile view of it, looking at it from the south?*

A. *Yes, sir.*

Q. *Is that what you saw when you looked at it from the north?*

A. *Yes, sir.*" (Emphasis ours.)

It is doubtful if Mr. Griffiths saw the wigwag at all. He was looking away from it when he saw the fire flying as the engine struck decedent's automobile (R. 420). Obviously, his narrow right angle view of the wigwag signal profile from two hundred feet away in the misty darkness doesn't compare with the clear full view that Messrs. Hewes and DeRosa had of the same signal squarely in front of it about seventy-five feet away. After all, the best way to tell if the signal was operating there in the misty darkness was to look squarely at it and note that the red light was not burning as it should have been (R. 64).

The third of the "three other persons" was appellee's fireman, Mr. Kafer, who only saw decedent's automobile for a fleeting instant as it emerged from behind the station when he hardly had time to holler to the engineer to stop. Mr. Kafer was in the cab on the left side at "K-1" on appellee's diagram, or less than two hundred feet north of the crossing and with the engine out in front traveling at a rate of between sixty-five and seventy miles per hour (Defendant's Exhibit D, R. 361, 367-368). At that speed, the train was going in excess of one hundred feet per second.

Since the wigwag was on the right side of the cab, Mr. Kafer couldn't observe it. Oddly enough, appellee's engineer, Mr. Stainbeck, who was on the right side of the cab where he could see the wigwag operating, didn't see the wigwag though it was his duty to do so (R. 328, 345).

Although the foregoing emphasizes the manifest injustice in repeatedly instructing the jury to find for appellee, appellee urges that "appellant points to no particular instruction to make claim that it is not proper and correct" (A.B., 67-68). Appellee must have ignored the Specification of Errors which furnishes appellee a complete answer (A.O.B., 9-11, 16-17).

The fact issues were for the jury. But how, in all fairness and justice, could the jury determine them properly guided by prejudicial errors, including the sixteen instructions clearly directing the jury over and over again to find for appellee in language "without ambiguity or possibility of misunderstanding". Rule 51 was never intended to unring the constant sour notes of this bell.

CONCLUSION.

The record shows that if the Court had permitted appellant to have been aided by the statutory presumption of ordinary care and lawful conduct, she would have proved conclusively that her deceased husband carefully started in a lawful manner to cross appellee's tracks and was killed in the process of doing so because of the railroad's negligence in the maintenance of its faulty wigwag crossing signal and the operation of its passenger train speeding silently towards the fatal accident. Prejudicial error was committed (1) when the Court's instructions removed the presumption of ordinary care from the

case, (2) when the Court excluded pertinent rebuttal evidence of the faulty wigwag signal, and (3) when the Court repeatedly instructed the jury to find for appellee, which, in fact, the jury did.

In the interest of fairness and justice, the judgment below must be reversed and appellant afforded a new trial.

Dated, San Francisco, California,
December 27, 1950.

Respectfully submitted,
HADSELL, SWEET, INGALLS & MURMAN,
SYDNEY P. MURMAN,
Attorneys for Appellant.

No. 12,593

IN THE

United States
Court of Appeals

For the Ninth Circuit

NELDA SHANAHAN,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY,

Appellee.

Appellee's Memorandum of Authorities
To Be Referred to on Oral Argument

A. B. DUNNE

LOUIS L. PHELPS

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Attorneys for Appellee

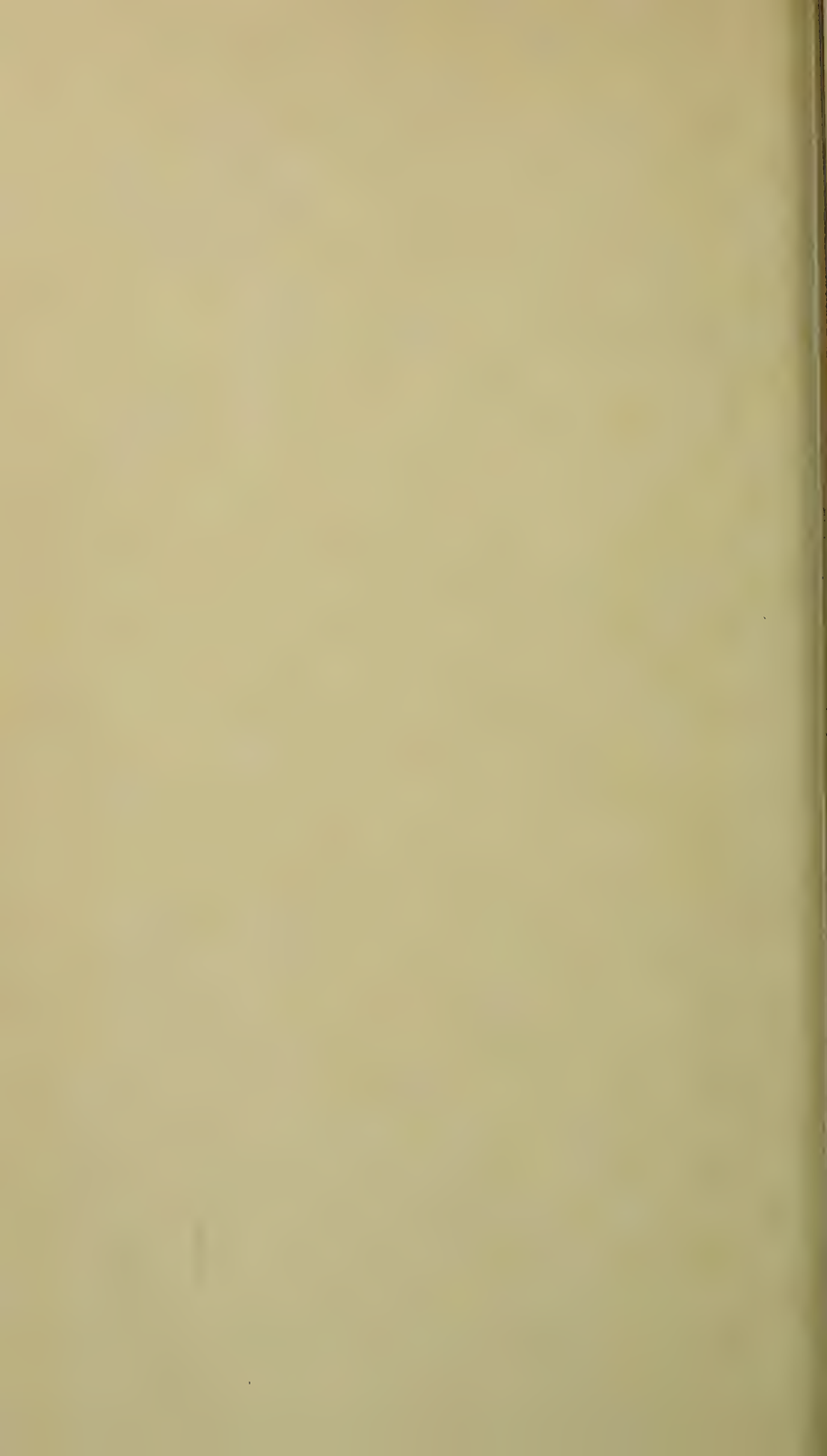


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Gutshall v. Wood, 123 F.2d 174 (C.A. for Dist. Col., 1941).....	3
Horning v. Dist. of Columbia, 254 U.S. 135, 65 L.ed. 185 (1920)	3
Kotteakos v. U. S., 328 U.S. 750, 90 L.ed. 1557 (1946).....	2
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Rule 61, Federal Rules of Federal Procedure.....	2



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**Appellee's Memorandum of Authorities
To Be Referred to on Oral Argument**

I.

On pages 33 and 34 of Appellee's brief the rule is stated that, even assuming error in the proceedings, a judgment will not be disturbed unless it appears that there has been a miscarriage of justice, unless it appears that the substantial rights of appellant have been prejudiced. Only Califor-

nia cases are cited in Appellee's brief. The same rule applies in the federal courts.

It is not enough for a party complaining of a judgment to show that there was some irregularity in the proceedings. He must not only show error, but that he was prejudiced by that error. He must show that he was prejudiced in a substantial way.

Section 2111 of the Judicial Code (28 U.S.C.A. § 2111) provides as follows:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Section 2111 is a re-enactment of section 269 of the old Judicial Code (28 U.S.C.A. § 391). Both sections have been repeatedly applied by the courts.

Further, Rule 61 of the Federal Rules of Civil Procedure provides:

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Rule 61 applies equally to appellate and trial courts.

Kotteakos v. U. S., 328 U.S. 750, 90 L.ed. 1557;

DeSanta v. Nehi Corp., (2d Cir.) 171 F.2d 696;
Gutshall v. Wood, (C.A. for Dist. Col., 1941) 123
 F.2d 174.

Before a judgment will be disturbed, prejudice must be shown.

Horning v. Dist. of Columbia, 254 U.S. 135, 65 L.ed. 185 (1920);
Carlisle Packing Co. v. Sandanger, 259 U.S. 255, 66 L.ed. 927 (1922);
Palmer v. Hoffman, 318 U.S. 109, 116, 87 L.ed. 645, 651 (1943);
U. S. v. Crescent Amusement Co., 323 U.S. 173, 184, 89 L.ed. 160, 169 (1944);
Shuman v. U. S. (5th Cir. 1927), 16 F.2d 457;
Nash v. U. S. (2d Cir. 1932), 54 F.2d 1006, cert. den. 285 U.S. 556, 76 L.ed. 945;
U. S. v. Parker (3d Cir. 1939), 103 F.2d 857, cert. den. 307 U.S. 642, 83 L.ed. 1522;
Lumberman's Mutual Casualty Co. of Ill. v. Timms & Howard, Inc. (2d Cir. 1939), 108 F.2d 497;
Daybrough v. Ware (6th Cir. 1940), 111 F.2d 548;
U. S. v. Monjar (3d Cir. 1945), 147 F.2d 916, 924, cert. den. 325 U.S. 859, 89 L.ed. 1979.

Appellant has the burden of showing prejudice. Even assuming error, prejudice will not be presumed, the presumption is the other way. "He who seeks to have a judgment set aside because of an erroneous ruling has the burden of showing that prejudice resulted." (*Palmer v. Hoffman*, *supra*.)

See also:

Berger v. U. S. 295 U.S. 77, 81, 82, 79 L.ed. 1314, 1318 (1935);

Daybrough v. Ware, supra.

The rule has been applied in cases of error in the admission of evidence (*U. S. v. Crescent Amusement Co.*, supra.), error in the exclusion of evidence (*Lumberman's Mutual Casualty Co. of Ill. v. Timms & Howard, Inc.*, supra.), and error in instructions (*Fraser v. Howell*, (C.A. for Dist. Col., 1950) 182 F.2d 703).

The above citation of cases is in no sense exhaustive. The cases applying the "harmless error" doctrine are far too numerous to list here. The rule and its application to this case cannot be disputed.

II.

Appellant argues that at the time of the accident the wig-wag signal at the crossing was not operating. The only evidence produced by appellant on this issue was the testimony of Hewes and DeRosa. At pages 52 and 53 of appellant's brief it is argued that this testimony of Hewes and DeRosa could have no probative value. If a witness sees a wig-wag signal he could say whether or not it was working. To say merely that he did not see it working means only that he did not see it *at all*. Squarely so holding is *Spreitler v. Louisville & N. R. Co.* (7th Cir. 1942), 125 F.2d 115, which involved a crossing accident and was a death case. The issue was whether or not the wig-wag signal at the crossing was operating at the time of the accident. Plaintiff called as a witness one Fournie who testified that he did not see the signal working, but that he could not say whether it was working or not. The court said at page 117:

"In the case at bar, the witness, Fournie, testified he was looking for the signal. He had to look through a hole left by snow that had slipped off the windshield, and he had to stoop down to look up to try and see the wigwag signal. Under such circumstances, if he had said the wigwag signal was not working, his testimony would have been sufficient to go to the jury and to support the verdict if one were returned by the jury. But Fournie did not say that. All he would say, in effect, was: 'I did not see it working. I would not say it wasn't working. I simply say I didn't see it working.' We submit that such an equivocal statement is no evidence at all that the signal was not working. It is only evidence that he did not see.

"The record speaks positively that Fournie saw nothing. How can testimony that he saw nothing be tortured into testimony that he saw something and the something was not working? No one disputes the fact that the signal was there beside the road and had been located there for over two years. Fournie never testified that he saw the signal on this occasion, although everyone admits it was there. Was the signal working or not working? That was the question. How could it be said from Fournie's testimony that the signal was not working, when there is no evidence he saw the signal at all? He did not say it wasn't working. He expressly declined to say so. When asked if he would say it was not working, he said: 'No * * * I wouldn't say that.'

"There was positive testimony by the engineer and brakeman that they saw the wigwag signal and it was working. That positive testimony is in no manner contradicted by or is it in conflict with Fournie's statement that he saw nothing. Since there was no conflict of evidence, there was nothing for a jury to resolve. Since Fournie saw nothing, the jury would be unwar-

ranted in finding that he saw something. The plaintiff had to rely and did rely solely on Fournie's testimony which, in our opinion, proved nothing. Therefore, there was a total failure of proof on the part of the plaintiff to prove the negligence alleged, and the motion for a directed verdict should have been sustained."

Respectfully submitted

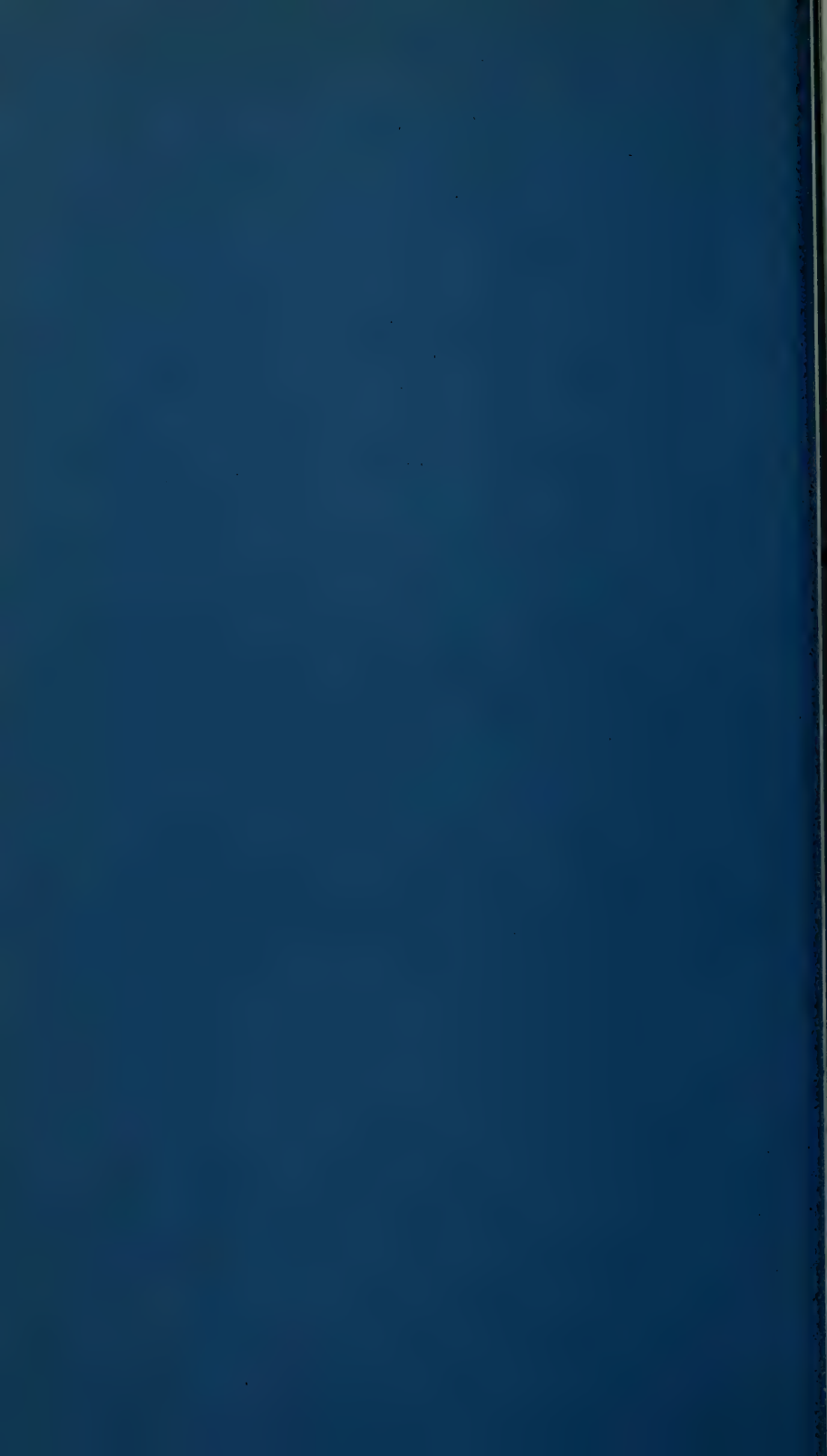
A. B. DUNNE

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(Appendix follows)



Appendix

In a number of instances of cases cited in Appellee's brief, only the official citation of the case was given, and the parallel Reporter System citation was inadvertently omitted. The following is a list of those cases, with both the official and parallel citation. The page number indicated opposite the case refers to the page on which the case appears in Appellee's brief.

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Court of Appeals
For the Ninth Circuit

P. G. TAYLOR, SEATON PORTER, HENRY W.
BUTLER, R. W. HAMMILL, W. E. HAMILTON,
FRANCIS BLOSSOM, D. J. WALSH, HARRISON
SMITH, P. S. PELLETIER, WYNN MEREDITH, In-
dividually and Doing Business as SANDERSON
& PORTER and SANDERSON & PORTER, a Part-
nership,

(Defendants) Appellants,

vs.

JOHN E. HUBBELL and WILMA HUBBELL,

Appellees.

TUCSON GAS, ELECTRIC LIGHT AND POWER COM-
PANY, a Corporation, and THE INDUSTRIAL
COMMISSION OF ARIZONA, a Public Agency,

(Intervenors) Appellants,

vs.

JOHN E. HUBBELL and WILMA HUBBELL,

Appellees.

Defendants-Appellants' Opening Brief

Upon Appeal from the District Court of the United States
for the District of Arizona.

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Upon Appeal from the District Court of the United States
for the District of Arizona.

Hon. CLAUDE MCCOLLOCH of Oregon Presiding

We have styled this brief as just above written for the
reason that the intervenors-defendants have also filed an
appeal and we thought it would avoid confusion by des-

ignating ourselves as indicated. Separate briefs will no doubt be filed by the other appellants. There is, however, but one Transcript. Figures in parentheses refer to Transcript pages.

I.

JURISDICTIONAL STATEMENTS

A. District Court

On October 25, 1949, appellees, husband and wife, filed their complaint against these defendants-appellants (also for convenience referred to as Sanderson & Porter) in the Superior Court of the State of Arizona, in and for the County of Pima (at Tucson) for damages for personal injuries to appellee, John E. Hubbell, alleged to be due to the negligence of defendants-appellants, and they prayed for judgment that any election, apparent election to take compensation or waiver under the Arizona Workmen's Compensation Act by appellee John E. Hubbell be held void and that they have judgment against defendants-appellants for \$205,000.00 (12). (After removal and just prior to trial appellees reduced their claim to \$125,000.00 and withdrew their prayer that said elections, etc., be declared void (100)). The same day summons was issued and duly served on defendants-appellants, through their agent in Tucson, Arizona (19). On November 10, 1949, defendants-appellants filed in the District Court their petition for removal of the cause to said District Court, together with the other papers required by law, and served written notice thereof upon appellees (2).

The District Court had original jurisdiction of the action because it is civil in nature, involves a matter in controversy exceeding the sum or value of \$3000.00 exclusive of

interest and costs, and is between citizens of different states. Title 28, Sec. 1332(a) (1) United States Code.

The case was removable and properly removed from the Superior Court to the District Court by virtue of the proceedings taken under the provisions of Title 28, Secs. 1441(a) and 1446, United States Code (Removal Petition 2).

After removal, the intervenors (whom we will for convenience style intervenors-appellants) were allowed by order of Court to intervene as defendants pursuant to stipulation of the parties (51).

After the motion of defendants-appellants to dismiss (25) and the motions to dismiss and for summary judgment of intervenors-appellants, (48) in which latter motion defendants-appellants joined, (55) were denied, (55) the case was tried to a jury on the complaint and answers of the parties, and resulted in a verdict (79) for the appellees against these defendants-appellants in the sum of \$50,000.00, upon which judgment in said amount was entered on April 14, 1950. (80) Impressed thereon was a lien in favor of Industrial Commission of Arizona for \$1659.19 (81). On April 17, 1950, defendants-appellants filed their motion to set aside the verdict and for judgment notwithstanding the verdict under Rule 50, Rules of Civil Procedure of the District Courts of the United States (84 to 87) and on April 24, 1950, their motion for a new trial (88 to 91). The former motion was denied on April 24, 1950, (91) and the latter on May 15, 1950 (92).

B. This Court

On May 22, 1950, these defendants-appellants filed their notice of appeal to this Court (92) and thereafter completed the record as required by law.

The controlling statutes and rules are Title 28, Secs. 1291 and 1294(1) United States Code, and Rules 73 to 76, inclusive, of the Rules of Civil Procedure of the District Courts.

* * * * *

While the points raised by the appeal of intervenors-appellants are, we believe, the same as most of the points raised by these defendants-appellants, the latter raise additional points and for that reason and because the approach to the problems involved by the intervenors-appellants is that of an agency of the State of Arizona, we ask the indulgence of the Court to our submission of briefs separate from those of the intervenors-appellants.

II.

STATEMENT OF THE CASE

The complaint alleges that appellee John E. Hubbell was employed by Tucson Gas, Electric Light & Power Company, a corporation, one of the intervenors-appellants, as a lineman and that he was working in that capacity on June 17, 1949, when he was injured by reason of the negligence of these defendants-appellants who were alleged to be engaged as an independent contractor under the firm name of Sanderson & Porter, in the construction of a power plant for said Power Company on certain premises in Pima County, Arizona, called herein DeMoss Petrie Power plant, in that these defendants negligently failed to advise

said appellee that certain conductors and switches on which said appellee was working had been energized with electricity.

It is alleged in the complaint (6 to 12) that said intervenor-appellant Tucson Gas, Electric Light & Power Company carried compensation insurance under the Workmen's Compensation Law of the State of Arizona with the Industrial Commission of Arizona, the other intervenor-appellant, and that appellee John E. Hubbell was covered thereby; that he filled out forms for compensation under said Act and received compensation checks and medical benefits from the said Commission; that any apparent election made by said appellee to accept the benefits of said insurance and thus be foreclosed from suing defendants-appellants was not binding; that he had made a binding election of remedy in writing, copy attached to the complaint, the same being that he elected to proceed under the provisions of Sec. 56-949, Arizona Code Annotated 1939, (see Appendix hereto) against a third party, to wit, these defendants-appellants, with compensation claim against his employer, said Tucson Gas, Electric Light & Power Company, and the Industrial Commission of the State of Arizona, the employer's insurance carrier, only to the deficiency, if any, between the amount which he might collect from the said third party and the compensation provided or estimated under the Compensation Act, and that he agreed not to compromise any action for personal injuries without the approval of said Industrial Commission (14).

These defendants-appellants by their answer admitted that the appellee John E. Hubbell was employed by the said Tucson Gas, Electric Light & Power Company as a

lineman and working in that capacity at the time he was injured, denied that they were engaged as independent contractors, and in that connection alleged that they were employed by the said Tucson Gas, Electric Light & Power Company, the employer of said appellee; denied that they were negligent and pleaded contributory negligence; and alleged that appellee John E. Hubbell had elected to accept compensation under the Compensation Act of the State of Arizona, had actually accepted compensation benefits under said Act, and that thereby his claim against these defendants-appellants was assigned to the Industrial Commission of the State of Arizona and that appellees were not in a position to maintain this action against these defendants-appellants (60 to 63).

At the trial the Court, after denying the motions of defendants-appellants and intervenors-appellants for a verdict for defendants-appellants (149), submitted to the jury issues involving negligence, contributory negligence, and the matter of damages, but did not submit to the jury and refused the request of these defendants-appellants to charge the jury with respect to the issues, namely, whether these defendants-appellants were third parties within the meaning of the Compensation Laws of the State of Arizona and whether the said appellee had made a binding election to accept the benefits of the Compensation Act of the State of Arizona and thereby foreclosed the appellees from maintaining this action (149, 150, 154, 155).

No point is made on this appeal by these defendants-appellants as to the correctness of the verdict and judgment with respect to the issues of negligence, contributory negligence or the amount of damages, and the appeal there-

fore is confined, as far as these defendants-appellants are concerned, to the following basic questions, as presented by the evidence and record:

Succinct Statement of Questions Involved

Does the evidence in this case conclusively establish as a matter of law, as held by the Court below:

(a) that defendants-appellants (Sanderson & Porter) were persons "not in the same employ" as appellee John E. Hubbell at the time of his injury on June 17, 1949, so as to render them (Sanderson & Porter) liable under the provisions of the Workmen's Compensation Act of the State of Arizona for negligence to appellee John E. Hubbell, an employee and insured under the Workmen's Compensation Act by the compensation policy of intervenor-appellant Tucson Gas, Electric Light & Power Company;

(b) that said appellee did not make a binding election to accept compensation from the Industrial Commission of the State of Arizona, the insurance carrier for said employer of said appellee, for his injuries and did not by reason of his actions in applying for and receiving compensation and other benefits under said policy issued pursuant to the Arizona Workmen's Compensation Law make an assignment to the said Commission of his claim, if any, against defendants-appellants (Sanderson & Porter) as non-employees of said Tucson Gas, Electric Light & Power Company; and that said appellee was not required to proceed further before the said Commission or the Arizona Supreme Court for relief after the said Commission

refused to accept his attempted election of remedy dated October 25, 1949?

The manner in which these questions were raised below (in addition to motions to dismiss and for summary judgment and motions made at close of appellees' case in chief, all being denied) was by defendants-appellants' answer (57, 60 to 63), motion for an instructed verdict in their favor made at the close of the entire case (142 to 144), motion that the verdict be set aside and judgment entered in their favor filed pursuant to said Rule 50 (84 to 87) and by paragraphs II and VII and I of Instructions requested by defendants-appellants (75 to 78).

III.

SPECIFICATIONS OF ERROR

No. 1. The Court erred in denying defendants-appellants' motion for a directed verdict made at the close of the case (142 to 144) and in denying defendants-appellants' motion for judgment in their favor notwithstanding the verdict and for judgment in accordance with motion for directed verdict (84 to 87) (orders denying motions 149, 91) made pursuant to Rule 50 of the Rules of Civil Procedure of the District Courts of the United States upon the following grounds, to wit:

(a) It appears from the undisputed evidence in the case:

That the appellee John E. Hubbell was an employee of the Tucson Gas, Electric Light & Power Company at the time he sustained the accident mentioned in the complaint and shown by the evidence, and was entitled to compensation and other benefits pursuant to

the policy of compensation insurance carried by said Company under the Workmen's Compensation Law of the State of Arizona, with the Industrial Commission of Arizona as insurance carrier for the injuries sustained by him which form the basis of this action; that as such an employee he was not entitled to any relief against these defendants-appellants under the Constitution and laws of the State of Arizona, particularly Article XVIII, Section 8, of the Constitution, Chapter 56, Article 9, A.C.A., 1939, and Sections 56-949 and 56-950 thereof, for that these defendants-appellants were in the same employ as the said appellee, to wit, in the employ of the said Tucson Gas, Electric Light & Power Company.

(b) It appears from the undisputed evidence in the case:

That the appellee, John E. Hubbell, prior to his injury and before the filing of this action had elected to be bound by the provisions of the said Workmen's Compensation Law of the State of Arizona in the manner provided therein; that after his injury the said appellee made an election to secure the benefits of the provisions of the said Workmen's Compensation Act, making application for said benefits and several supplemental applications therefor, without any fraud or influence of any kind, freely and voluntarily, and under the belief that he had a claim against these defendants-appellants as persons not in the employ of said appellee's employer, Tucson Gas, Electric Light & Power Company; that the said appellee, John E. Hubbell, did accept payments of compensation under

said election from the said Industrial Commission pursuant to its award dated July 9, 1949 (108, 109), during the period from the date of his accident, June 17, 1949, to and including August 31, 1949, in the sum of \$621.85 and the payment by the said Commission of his medical expenses arising because of his accident in the sum of \$896.00; that the said actions of the said appellee constituted and were an election valid, binding and conclusive on appellee of remedy under the provisions of Article XVIII, Section 8, of the Constitution of Arizona, and Chapter 56, Article 9, A.C.A., 1939, and particularly Sections 56-949 and 56-950 thereof, whereby the alleged claim against these defendants-appellants become assigned to and enforceable only by said Industrial Commission of Arizona to the extent it was liable to said appellees under said Compensation policy.

No. 2. (a) The Court erred in withdrawing on its own motion from the consideration of the jury the issue outlined in Specification 1(a) above and in holding as a matter of law (see Court's Statement 149, 150) at the close of the evidence that that issue should be resolved in favor of appellees and should not be submitted to the jury, for the reason that there was real and substantial evidence upon which the jury could have rendered a verdict for these defendants-appellants on the issue specified.

(b) The Court erred in withdrawing on its own motion from the consideration of the jury the issue involved in Specification 1(b) above and in holding as a matter of law (see Court's Statement 149, 150) at the close of the evidence that that issue should be resolved in favor of ap-

pellees and should not be submitted to the jury, for the reason that there was real and substantial evidence upon which the jury could have rendered a verdict for these defendants-appellants on the issue specified.

No. 3. The Court erred in refusing defendants-appellants' requested instructions numbers II and VII, as follows (75, 76):

"II.

I charge you, Ladies and Gentlemen of the Jury, that if you find from the evidence that the Tucson Gas, Electric Light & Power Company had and retained at all times the right and authority to supervise all work done by Sanderson & Porter, and the method and means of doing such work, specified in the Letter of Agreement in evidence, dated March 3, 1948, then your verdict must be for the defendants even though you find that the said Tucson Gas, Electric Light & Power Company did not at all times actually exercise such power and authority."

"VII.

I charge you, Ladies and Gentlemen of the Jury, that the plaintiffs in this case allege that the defendants, Sanderson & Porter, were independent contractors. For the purposes of this case, I charge you that whether or not the defendants, Sanderson & Porter, were independent contractors as alleged by the plaintiffs turns on the question whether the Tucson Gas, Electric Light & Power Company retained its right under the contract to supervise the services of the defendants, Sanderson & Porter, in the doing of the work specified in the Letter Agreement of March 3, 1948. That Letter Agreement in terms provides that the services of Sanderson & Porter in connection with the project were to be performed under the super-

vision of the Tucson Gas, Electric Light & Power Company and in cooperation with the officers, employees and other representatives of that Company. Under this contract, Sanderson & Porter were not independent contractors and the only way in which they could become independent contractors would be by a course of conduct on the part of the officers of the said Tucson Gas, Electric Light & Power Company and the representatives of Sanderson & Porter whereby that provision in the contract was waived.

“I therefore charge you that if Tucson Gas, Electric Light & Power Company through its officials reserved and retained its right to supervise the services of the defendants, Sanderson & Porter, at all times, even though it did not exercise that right, then the defendants in this case were mere agents or employees and were not independent contractors. The burden of proof that the defendants, Sanderson & Porter, were independent contractors is upon the plaintiffs and unless you are satisfied by a preponderance of the evidence that the plaintiffs have proven that the defendants, Sanderson & Porter, were independent contractors, your verdict must be for the plaintiffs.”

for the reason that there was real and substantial evidence upon which the jury could have rendered a valid verdict for these defendants-appellants on the issues specified. (Presentation to trial court found at Tr. 154, 155).

No. 4. The court erred in refusing defendants-appellants' requested instruction number I, as follows:

“I.

I charge you, Ladies and Gentlemen of the Jury, that if the plaintiff, John E. Hubbell, at the time he made the claims for additional compensation from

The Industrial Commission of the State of Arizona, dated July 14, 1949, August 15, 1949, August 30, 1949, and September 12, 1949, or any of them, was in such mental condition as to be able to act voluntarily, your verdict must be for the defendants.”,

for the reason that there was real and substantial evidence upon which the jury could have rendered a valid verdict for these defendants-appellants on the issue specified (Presentation to trial court found at Tr. 154, 155).

No. 5. The Court erred in denying defendants-appellants' motion for a new trial wherein the errors specified in Specifications 2(a), 2(b), 3 and 4 were relied on for the reason set forth in said specifications (88 to 91, 92).

IV.

ARGUMENT

Summary

Intervenor-appellant, Tucson Gas, Electric Light & Power Company, has for years been engaged, as a public utility, in the manufacture, distribution and sale of gas and electricity in Tucson and environments. It has carried compensation insurance with the Industrial Commission of Arizona, as insurer. On June 17, 1949, appellee John E. Hubbell was engaged in working for that company as a lineman and during the course of his employment came in contact with conductors carrying 13,800 volts of electricity, to his serious and permanent injury. Said conductors were being installed as a part of the project on which defendants-appellants, Sanderson & Porter, were working. He put in a claim for compensation on July 6, 1949 (164); and an order allowing his claim was entered by the Commission on July 9, 1949 (186) under which payments of compensation

were made to him to and including August 30, 1949, in the aggregate sum of \$621.85 at a daily rate of \$8.40 (175) and payments were also made by the Industrial Commission for medical attention to Mr. Hubbell in the sum of \$896.00 (64). Thereafter, on October 24, 1949, he undertook to file an election under Section 56-949 A.C.A. 1939 (168). If this election was effective, which defendants-appellants maintain was not the case, said appellee could, under the laws of Arizona, pursue his claim of negligence against these defendants-appellants and hold the Industrial Commission for any deficiency between what he might be able to collect from defendants-appellants and what he would have received from the Industrial Commission as such insurer had he chosen to accept compensation alone. The Industrial Commission after investigation rejected this election of October, 1949, concluding that defendants-appellants were not subject to suit as third parties under said Section 56-949 (McCluskey 124).

The undisputed evidence is that appellee John E. Hubbell believed at all times while he was accepting compensation from the Industrial Commission that he had a claim against the defendants-appellants as third parties. His testimony was that he believed he could hold both the Commission and the third parties until advised otherwise by his attorneys. It was then he made his election of October 25, 1949 (108, 109).

* * * * *

For some time before the contract between Tucson Gas, Electric Light & Power Company (hereinafter sometimes called the Company) and Sanderson & Porter (these defendants-appellants) was made, on March 17, 1948 (35 to

48), the Company had determined to enlarge its facilities and had made tentative arrangements to purchase a turbo-generator of 20,000 K.W. capacity. This order not materializing, it later placed an order for an 11,500 generator and that order was in effect at the time the contract was signed. After work had begun under the contract, a generator of 12,500 K.W. was actually purchased and installed, necessitating considerable adjustments and additional work by reason of the different size and capacity of the generators. These facts are related for the purpose of clarifying the situation for the Court. Thereafter, the Company decided to install another generator, this time one of 11,500 K.W. capacity. This installation was included in the contract and the second generator also installed. The installation of these generators and equipment therefor was the project involved in the contract between the Company and Sanderson & Porter. The total cost of these generators and equipment was approximately \$1,500,000.00 (Lovell 117). With the decision to purchase them, Sanderson & Porter had nothing to do (Snider 128, Lovell 116, 117). While the Company had men of adequate skill and experience to install these generators and integrate them into the existing system (117, 133), additional engineers were necessary and accordingly the contract was made with Sanderson & Porter (Snider 130).

We would like at this point to state our view of the terms of the contract found in the Record at (35 to 48).

Sanderson & Porter, an engineering firm in New York City, were to render services to the Company as engineers and constructors in connection with the installation of the generators and equipment. All such services were to be

performed under the supervision of the Company and in cooperation with officers, employees and representatives thereof (Contract Article II). Sanderson & Porter were to coordinate their work so there would be turned over to the Company a plant capable of operation with reliability and economy. Orders for materials were to be in the Company's name and account. Sanderson & Porter were to be furnished in advance moneys to meet the payroll. Compensation was on percentage of cost basis.

By Articles VII and VIII of the Contract, Company reserved the right to make additions and alterations and, on thirty days' notice, to discontinue work, compensation adjustments to be by agreement or by arbitration.

We desire to add that the contract contains no provision limiting the complete right of supervision granted in Article II. The unlimited scope of this right of supervision is emphasized by the provisions of the contract reserving to the Company the right to add or subtract from the contract or to discontinue it altogether. Sanderson & Porter were to furnish no equipment or materials, gave no bond or guarantee of performance. In the enterprise they risked no money except salaries paid to their engineers and living expenses. They were to render services and, we submit, nothing else.

The evidence revealed no departure from the terms of the contract. We submit it emphasizes the Company's right of unlimited supervision. The witness Lovell, superintendent of electrical construction of the Company, called as a witness by appellees, testified concerning his daily visits to the job:

"I was to observe the various assembly and construction progress, correlate it with the operations of our

company, both at the time and be sure it coordinated with our transmission and distribution facilities after it was in operation.” (113)

“The purpose of my visits was to consult with the designers, observe the erection of equipment, observe the progress of the job, make suggested changes and familiarize myself with the progress of the job itself.” (114)

“Under the contract the Company had supervision of all means and methods by which the contract should be performed. The Company never surrendered that right to supervise and control the methods and means. The purpose of all of my visits out to the plant was to see that the work was done right.” (117)

Mr. Snider, President of the Company, a witness for defendants-appellants, testified:

“When the contract with Sanderson & Porter was signed to construct this power plant for us it was never the Gas Company’s contention that Sanderson & Porter should be independent contractors. It would be impossible for us to operate that way because we had to have a contract where we had supervision and could control the various steps of the construction as it developed. This supervision in our company over Sanderson & Porter was absolutely essential. Our company could have installed this plant ourselves but we would have had to go out and hire engineers and designers and expand our staff. We were in a hurry to expand our facilities and about that particular time every power company in the country was expanding and good men were scarce and it would slow things up if we had to go out and test the qualifications of all men we hired as engineers and designers to be sure that they were capable.” (129, 130)

And Mr. Saunders, Superintendent of Power Production, witness for defendants-appellants, testified:

"I was out there at the new plant every day." (132)
 "I wanted to be sure everything was being installed properly and wanted to maintain general supervision over the work." (132) "I also had Mr. Dick Swinehart out at the plant all of the time during construction." (132) "Mr. Bill Soukup is the plant electrician who works under Mr. Swinehart and he also was present all of the time during the construction of the plant." (133)

Mr. Broockmann, representative of Sanderson & Porter on the job, testified:

"While building this new plant, the Tucson Gas people had the right at all times to tell me exactly what they wanted to be done. The Gas Company had the right to tell me how the job should be done and I dealt almost entirely in matters of policy and finance with Mr. Snider. In matters of engineering details and plant locations we always got together with Mr. Saunders, Mr. Swinehart, Mr. Soukup and Mr. Lovell. It was my understanding and belief that this contract which Sanderson & Porter entered into with the Tucson Gas Company did not make Sanderson & Porter independent contractors. In my opinion, we were working for them and were their servants." (137)

"The general outline of work to be done was designed in our New York office but after we arrived here in Tucson there was a great deal of work still to be done and matters to be decided and details to be worked out which could only be done in conjunction with the Gas Company itself." (137, 138)

"There were many changes made during the course of construction out there at the plant and several times after we would complete a job Mr. Snider would come

out and say the Company did not like this or that feature and the change would be made immediately.” (138)

“Mr. Snider did not attempt to supervise all of the work; sometimes he would pick on the smallest things.” (140)

“We hired our employees without getting any approval from Tucson Gas Company, and we had the right to fire them without consulting Tucson Gas Company. Tucson Gas had this right, also, and I had to take one of my best supervisors off the job when Mr. Snider said take him off.” (141)

Specifications 1(a), 2(a)

WHERE A CONTRACT SPECIFIES THAT THE RIGHT OF SUPERVISION OR CONTROL OF THE WORK TO BE PERFORMED THEREUNDER REMAINS COMPLETELY IN THE EMPLOYER, THE PERSON ENGAGING TO DO SUCH WORK IS NOT AN INDEPENDENT CONTRACTOR AND IS AN EMPLOYEE.

In the Summary we have undertaken to give our views of the contract and of the undisputed testimony offered at the trial concerning the practice of the parties thereunder. We thought it might be more convenient to the Court to summarize the entire case at that point and trust there has been no infraction of the rules in so doing.

Our position briefly is that by the terms of the contract the supervision and control of the project retained by the Company brought about a relationship of employer and employee between the Company and Sanderson & Porter—and not a relation of independent contractor.

At the trial evidence was received, without objection from either party, concerning the actual practice of the parties involved in the performance of the contract. We have recited our views of the evidence on that score. We

submit that it in no wise limited the sweeping scope of the power of supervision retained by the Company and reveals unmistakably that that power was not surrendered or limited in any regard in actual practice.

We assume that the law of Arizona is controlling. Whether or not the contract was made in Arizona in the strict legal sense, it was to be performed in Arizona and is therefore, we believe, governed by Arizona law.

This question has been before our Arizona Supreme Court on a number of occasions. For the convenience of the Court, we have set forth in the Appendix the Constitution and statutes which we think are involved.

THE ARIZONA LAW

By Article XVIII, Section 8, of the Arizona Constitution (amended in 1925), the Legislature was enjoined to enact a Workmen's Compensation Law by which compensation should be paid to an employee injured in the course of his employment by a necessary risk or danger inherent in the nature thereof "or by a failure of such employer, or any of his or its agents or employee or employees, to exercise due care, or to comply with any law affecting such employment". Pursuant thereto there are in effect Chapter 56, Sections 900 to 977, Arizona Code, 1939. It is not denied that appellee John E. Hubbell was entitled to compensation under this Act. Section 56-949 gives an employee entitled to compensation who is "injured by the negligence or wrong of another not in the same employ" an election to pursue his remedy "against such other". Section 56-928 undertakes to define employers and independent contractors. Although this statute is quoted in the Appendix, its pertinency in

this case justifies, we believe, quotation of paragraphs (b) and (c) thereof. (This Section is found in the Pocket Part of Volume 4 of said Code). They are as follows:

“(b) When an employer procures work to be done for him by a contractor over whose work he retains supervision or control, and such work is a part or process in the trade or business of the employer, then such contractors and the persons employed by him, and his subcontractor, and persons employed by the subcontractor, are within the meaning of this section, employees of the original employer.

“(c) A person engaged in work for another, and who while so engaged is independent of the employer in the execution of the work, not subject to the rule or control of the person for whom the work is done, but is engaged only in the performance of a definite job, or piece of work, and subordinate to the employer only in effecting a result in accordance with the employer's design, is an independent contractor, and an employer within the meaning of this section. (Laws 1925, ch. 83, Sec. 44, p. 345; rev. R. C. 1928, Sec. 1418; Laws 1945, ch. 33, Sec. 1, p. 65.)”

It is, of course, apparent that if Sanderson & Porter were employees, whether as agents or servants, of the Company, there can be no recovery by appellees in this case. No liability may attach to them as persons “not in the same employ” unless they are to be considered independent contractors.

The Arizona Supreme Court has considered these statutes and the law governing the relation of employer and employee and employer and independent contractor and has announced and adhered to the primary rule that the

question turns upon whether the employer retains the right of supervision or control of the contracted work.

In

Industrial Commission v. Byrne, 62 Ariz. 132, 134,
155 Pac.(2) 784,

the Court said:

“We have, in a number of cases, decided that the test to determine if one is an employer or an employee is whether the employer retains supervision or control of the work. *Grabe v. Industrial Comm.*, 38 Ariz. 322, 299 Pac. 1031; *Fox West Coast Theatres v. Industrial Comm.*, 39 Ariz. 442, 7 Pac.(2d) 582; *United States Fidelity & Guaranty Co. v. Industrial Comm.*, 42 Ariz. 422, 26 Pac.(2d) 1012.”

That Court has declared that an important factor in determining the right of control is whether the employer may terminate the relationship without liability. In

L. B. Price Mercantile Company v. Industrial Commission, 43 Ariz. 257, 30 Pac.(2d) 491,

one Evans had a written contract with the alleged employer and had the right over a certain area to sell the latter's goods. He was killed in an automobile accident and his dependents sought compensation under the Act.

The Court had this to say on the subject:

“And in determining if the employer retains control the most important factor is whether either party may terminate the relation without liability. ‘Where such right exists,’ to use the language of the court in *Industrial Com. v. Hammond*, 77 Colo. 414, 236 Pac. 1006, 1008, ‘the workman is usually a servant. Where it does not exist, he is usually a contractor’. The power

of the employer to end the employment at any time he sees fit is incompatible with the full control of the work which an independent contractor enjoys. 14 R. C. L. 72; Press Publishing Co. v. Industrial Acc. Com., 190 Cal. 114, 210 Pac. 820; New York Indemnity Co. v. Industrial Acc. Com. of California, 80 Cal. App. 713, 252 Pac. 775; Clark's Case, 124 Me. 47, 126 Atl. 18. In *Industrial Com. v. Bonfils*, 78 Colo. 306, 241 Pac. 735, 736, the court said:

“By virtue of its power to discharge, the company could, at any moment, direct the minutest detail and method of the work. The fact, if a fact, that it did not do so is immaterial. It is the power of control, not the fact of control, that is the principal factor in distinguishing a servant from a contractor. *Franklin Coal & Coke Co. v. Ind. Com.*, 296 Ill. 329, 129 N.E. 811. The most important point ‘in determining the main question (contractor or employee) is the right of either to terminate the relation without liability.’ ”

Again, in

Southwest L. Mills, Inc. v. Industrial Commission,
60 Ariz. 199, 134 Pac.(2d) 162,

the Court had this to say:

“Counsel for claimant contend that paragraph IV of the contract (quoted above) between the Company and the Contractor empowers the former to cancel the contract at its own will and pleasure. If this provision of the contract were susceptible of such a construction it would be very strong evidence that the Company retained supervision and control of the work of felling, hauling and delivering the timber to its mill pond at Flagstaff. It authorizes the Company, if the Contractor without its consent assigns or attempts to as-

sign the contract, or becomes insolvent or bankrupt, etc., to terminate the contract. The grounds upon which the contract might be terminated by the Company must be substantial. It could not upon its own wish or at its pleasure terminate the contract."

The latest Arizona case is, we believe,

Blasdel v. Industrial Commission, 65 Ariz. 373, 181 Pac.(2d) 620.

There the Court said:

"The body of law concerned with distinguishing independent contractors from employees is, indeed, huge. And though no hard and fast rule can be set forth, but instead each case must be determined by the sum total of its own facts, the general test laid down by our own statute (Sec. 56-928) and by the great weight of authority is whether the alleged employer 'retains supervision or control over the method of reaching a certain result, or whether his control is limited to the result reached, leaving the method to the other party.' *United States Fidelity & Guaranty Co. v. Industrial Commission*, 42 Ariz. 422, 26 P.(2d) 1012, 1015. In order to apply this test and so determine the extent of this 'right of control', courts look for a variety of signposts or indicia none of which are in themselves conclusive but which when taken together and applied to a particular set of facts, aid in making the line to be drawn more clear. *Prosser on Torts*, 1941 pp. 474, 475; *Restatement of the Law of Agency*, Ch. 7, Sec. 220; *Lee Moor Contracting Co. v. Blanton*, 49 Ariz. 130, 65 P.(2d) 35; *Consolidated Motors v. Ketcham*, 49 Ariz. 295, 66 P.(2d) 246; *Industrial Commission v. Meddock*, 65 Ariz. 324, 180 P.(2d) 580."

It is respectfully submitted that the contract, and the practice thereunder, leave no reasonable permissible deduction except that this job of installation of these generators as a part of the existing plant and system of the Company was under the complete and unlimited supervision and control of the Company and that consequently Sanderson & Porter were employees within the meaning of the Constitution and statutes of Arizona and were not independent contractors.

Specifications 2(a) and 3

NOTWITHSTANDING MOTIONS FOR AN INSTRUCTED VERDICT BY DEFENDANTS-APPELLANTS AND THE OTHER PARTIES TO THIS ACTION, DEFENDANTS-APPELLANTS WERE, UPON DENIAL OF THEIR SAID MOTION, ENTITLED TO HAVE THE ISSUE RAISED BY THE PLEADINGS WHETHER THEY WERE EMPLOYEES OR INDEPENDENT CONTRACTORS DECIDED BY THE JURY, THERE BEING AMPLE EVIDENCE IN THE RECORD TO SUPPORT A VERDICT FOR DEFENDANTS-APPELLANTS ON THAT ISSUE.

By Rule 50, Federal Rules of Civil Procedure, it is expressly provided that no waiver of the right to go to a jury results from a motion for an instructed verdict, even though all parties make like motions.

After the Court denied the several motions presented at the close of the evidence, he announced:

“The Court: My view is, there are only two questions to talk to the jury about; the one is whether this defendant was negligent and the other is contributory negligence.

“Mr. Jones: The independent contract,—you don’t think the jury is concerned with that?

“The Court: I think not.” (149)

And in the Court’s Instructions no mention of the two issues, independent contract and election of remedies, was

made. In the Court's language, they were "eliminated by rulings". (150) Before the jury retired, counsel were afforded the right to submit requested instructions, which was done (154 to 156). Our Requests VII and VIII covered this issue. It was, of course, an idle gesture as the Court had previously determined the matter and the requests were denied (155, 156).

We do not know why the Court refused to submit this issue to the jury. If he did so because he believed the contract as written was controlling (that the evidence of practice thereunder though offered by appellees as well as defendants-appellants without objection should be disregarded) and that by the terms of the contract the relation of Sanderson & Porter to the Company was that of an independent contractor, there is nothing further for us to add to our argument under Specification No. 1(a) and we submit he was in error.

If the Court took the view that on the entire evidence, the written contract and the practice thereunder, defendants-appellants were independent contractors, we would like to add to our previous argument this: an issue of fact was necessarily raised which the jury should have decided.

Witnesses on this issue were examined and cross examined. Each side undertook to present to the jury evidence to support his contention. Appellees sought to show, for example, from the witnesses that the Company was interested only in the finished job, had no interest in the details, actually made no supervision of the method of doing the work, and so on. Defendants-appellants undertook to show the reverse. The testimony of the witness Lovell, called by appellees, and of witnesses Saunders, Snider and Broock-

mann, called by defendants-appellants, is almost entirely on that issue. We invite the Court's attention to their testimony.

Unless all this testimony was utterly immaterial, and might be disregarded though offered by appellees as well as these defendants-appellants, the Court was in error, we submit, in taking this issue, on which appellees had the burden of proof, from the jury and deciding it as a matter of law. It was a denial of the right of the parties to a trial by jury, guaranteed by the Seventh Amendment to the Constitution of the United States.

As stated, the Court announced that this issue, and that of election of remedies, would not be submitted to the jury in any form whatsoever. It was perhaps unnecessary for counsel to submit the requested instructions II and VII, as obviously they would not be granted. Under the circumstances in this case it would seem to be immaterial whether those requests are technically correct or not—the Court was unwilling to submit any instructions on that issue to the jury.

We believe that they are technically correct. In any event they were clearly sufficient to bring the issue to the attention of the Court and the Court's failure to charge on the issue in any manner was error.

4 C.J.S. 629;

St. Paul etc. Insurance Company v. Bachmann, 285 U.S. 112, 52 S.C.R. 270, 76 L.Ed. 648.

See, also,

Gulf etc. Railway Company v. Moser, 275 U.S. 133, 48 S.C.R. 49, 72 L.Ed. 200.

Specifications 1(b) and 2(b)

THE ACTION OF APPELLEE JOHN E. HUBBELL IN PRESENTING CLAIMS FOR COMPENSATION UNDER THE WORKMEN'S COMPENSATION ACT AND ACCEPTING COMPENSATION AND BENEFITS OF THAT ACT PURSUANT TO THE ORDER OF THE INDUSTRIAL COMMISSION, WERE FREELY AND VOLUNTARILY MADE UNDER THE BELIEF THAT HE HAD A CLAIM FOR PERSONAL INJURIES AGAINST THE DEFENDANTS-APPELLANTS AS THIRD PARTIES AND CONSEQUENTLY AMOUNTED TO AN ASSIGNMENT OF HIS CAUSE OF ACTION AGAINST DEFENDANTS-APPELLANTS TO THE INDUSTRIAL COMMISSION OF ARIZONA. (SEE SECTIONS 56-946, 949, 950 APPENDIX.)

Appellees' first claim for compensation was signed July 6, 1949 (164). He made several supplemental claims (177 to 185). He later withdrew the one dated September 14, 1949 (108). Under the order of the Commission (186) he received compensation to and including August 30, 1949—covering a period of approximately eleven weeks (175). He also received medical benefits in a substantial sum. All the time he believed he could hold these defendants-appellants also and intended to do so (109).

No claim is made that he was induced to accept these benefits by any act on the part of these defendants-appellants or the Industrial Commission. It was not until October 24, 1949, that he filed an attempted election to hold defendants-appellants as third parties and look to the Commission for the deficiency between what he might recover from these defendants-appellants and what he would otherwise be entitled to by way of compensation. It is submitted that his earlier actions constituted an election under the provisions of 56-949 and 56-950.

If, as defendants-appellants claim, a binding election was made by appellee John E. Hubbell to accept compensation (and his election of October, 1949, consequently was

abortive) then the situation is that the Industrial Commission is the owner of the appellees' cause of action and it alone may enforce the same.

While the Commission becomes the assignee of the claim, it nevertheless may not recover more than it would otherwise have been required to pay had the injured employee accepted compensation.

Industrial Commission v. Nevelle, 58 Ariz. 325, 119 Pac.(2) 934.

The Industrial Commission makes no claim that these defendants-appellants were third parties within the meaning of Section 56-949. If that Commission is the assignee by law of the claim of the appellees, these defendants-appellants are entitled to judgment. And even if the Commission should assert any claim, now or hereafter, against these defendants-appellants, they would be limited as stated. Consequently, these defendants-appellants are interested in this feature of the case.

The equitable doctrine of election of remedies is, we believe, not applicable. We are here considering the effect of statutes expressing the public policy of the State of Arizona.

An employee has the right under the Arizona Constitution and laws to remedies under the Workmen's Compensation Act, the Employers' Liability Act (as to certain hazardous employments) and the common law (modified in the employee's favor as to a number of defenses) for personal injuries. Prior to 1925, when Article XVIII, Section 8, of the Constitution was amended to its present form, the injured employee could make his election after his injury

to accept compensation under the Workmen's Compensation Act or sue the employer in the Superior Court under the Employers' Liability Act, if the accident was within its terms, or at common law. (He could in his complaint join causes of action under the two latter.) Once, however, he elected to accept compensation on the one hand or sue his employer as stated on the other, he was not allowed to change his position. While this type of election is not the precise one here involved, we submit it is definitely analogous and that the cases thereon are controlling.

The leading case on the subject of election of remedies against the employer is

Consolidated Arizona Company v. Ujack, 15 Ariz. 382, 139 Pac. 465.

The case arose under the Constitution before it was amended in 1925. The employee had the right to exercise his election to take compensation or sue his employer after his injury. The Court said:

"The last sentence of section 14, reads: 'Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively.' This seems to us a plain declaration by the legislature that the employee is at liberty to pursue any of the remedies provided by law until he adopts one by instituting a suit for redress, when the one adopted becomes exclusive."

This right of election after injury proved unsatisfactory and resulted in the amendment of Article XVIII, Section 8, to its present form in 1925. It now requires the employee to make his election before injury and additionally creates an automatic election on his part to accept compensation

unless he affirmatively rejects the right to compensation under the Workmen's Compensation Act.

As we understand the law, the fact that an employee is ignorant, unable to read, does not understand he has an option as to remedies, etc., is no excuse. He is bound to take compensation unless he affirmatively rejects the Act before injury. The public policy of the State is deemed best served by that inflexible attitude.

By construction of the statutes a thirteen year old boy was held to have made a binding election to take under the Act, where he failed to file a rejection. His infancy was no excuse.

S. H. Kress & Company v. Superior Court, 66 Ariz. 67, 182 Pac.(2) 931.

While we find no cases in Arizona where an employee has undertaken to avoid his implied choice to take under the Workmen's Compensation Act because of misunderstanding of his rights, there are cases where the reverse situation has arisen. In these the employee insisted that he should be permitted to repudiate a rejection which he had signed and be allowed to take compensation benefits allowed under the Act. The Court laid down the test that the rejection of the employee may not be avoided unless it was induced by fraud, coercion, misrepresentation or wrongful act on the part of the employer, insurer or someone in his behalf.

Bradley v. Industrial Commission, 51 Ariz. 291, 76 Pac.(2) 745;

Red Rover Copper Company v. Industrial Commission, 58 Ariz. 203, 118 Pac.(2) 1102, 137 A.L.R. 740;

Whipple v. Industrial Commission, 59 Ariz. 1, 121 Pac.(2) 876.

A very late case is closer to this one, we think.

Weaver v. Martori, 69 Ariz. 45, 208 Pac.(2) 652.

In that case a guardian of a minor employee (as alleged) brought a suit against a third person instead of seeking compensation. That suit was lost and then the guardian applied for compensation under the Act. The Commission took the position that an election had been made by filing the suit and that it was binding. The court said:

"The Commission suggests that the filing of this suit constituted an election of remedies under Section 56-950, A.C.A., 1939, and that the minor, acting through petitioner, had no right to file the instant claim for compensation. If we were dealing with the rights of an adult, or of minors who under Section 56-974, A.C.A., 1939, were deemed sui juris, this contention would be sound."

The court went on to hold, however, that the guardian had no right to make an election.

If an action at law against the third person is a binding and conclusive election, the reverse would seem to be equally true.

In

Moseley v. Lily Ice Cream Company, 38 Ariz. 417, 300 Pac. 958,

there was involved a situation similar to the one presented in this case. The injured employee accepted compensation under the Act and later brought an action against the third party. The court held that his acceptance of the compensa-

tion amounted to an assignment by him of his cause of action to the Commission and that he was therefore in no position to sue the third party. The court, however, did add this language:

“It is urged, however, by appellant, that even though the section be constitutional, and its meaning be such that he had lost his right to sue if he chose compensation, under the particular facts in this case the election made was not binding on him. It is, of course, true that an apparent election made in a case of this nature, just as in any other case, is subject to be set aside for many reasons. But this issue must be raised by the pleadings. On examining them, it appears that appellant at no time asked to have his election set aside for any reason, although he admitted he had been advised by counsel after his acceptance of compensation and before the bringing of this action against appellee that such acceptance would bar any recourse against appellee. His contention was that he was exercising a constitutional right, which was not subject to election, and which could not be abrogated or taken away by act of the Legislature. In this particular case, therefore, we need not consider the question as to whether his apparent election might have been set aside on a proper showing, since the pleadings do not raise such an issue.”

This expression was seized on by counsel in the court below as indicative of an opinion by our Arizona Supreme Court that an injured employee may make an election to sue a third party notwithstanding his prior acceptance of compensation. No doubt the Court had in mind elements of fraud, undue influence, misrepresentation and overreaching in using the words “many reasons”. In any event

the Court clearly signified that an issue of fact had to be raised by the pleading—that an election could not be repudiated out of hand. The concluding sentence of the quotation is the real holding of the Court, revealing all else to be *dicta* or *arguendo* only.

Finally it is submitted that appellee John E. Hubbell should have carried his claim to the Arizona Supreme Court under the procedure set up for that purpose—*certiorari* under Section 56-972. After receiving an order based on his application for compensation (186) and failing in his effort through Counsel to have the Commission accept his later claim of election (McCluskey 124) the way was open to him to have the proper authority, the Supreme Court of Arizona, charged with the duty of administering this law and thoroughly cognizant of its intent and purpose from its consideration of many hearings, pass upon his contention and decide finally and authoritatively whether he had made an election to accept compensation under the Act or was entitled to make his attempted election of October 25, 1949.

While the Industrial Commission may act as insurer (and did in this case) it is nevertheless the tribunal charged with the enforcement of the Workmen's Compensation Act and necessarily acts in a semi-judicial capacity.

Red Rover Copper Company v. Industrial Commission, *supra*.

To that extent its jurisdiction is plenary and the sole authority to review its orders and actions is the Supreme Court of the State.

S. H. Kress & Company v. Superior Court, 66 Ariz. 67, 182 Pac.(2) 431.

Specifications 2(b) and 4

As already stated, the Court gave no reason for withdrawing from the jury the issue whether appellee John E. Hubbell had made an election to accept compensation benefits before his attempted election of October 25, 1949.

From the evidence the jury could have reasonably found that said appellee with full knowledge of the consequences of his act accepted compensation benefits. It is true he denied knowing that he had to make an election until he had employed attorneys (105) but surely these defendants-appellants are not bound to accept his testimony—that of adverse party—as true. There was ample evidence in before the jury to contradict appellee—such as his failure when he put in his original claim for compensation to mention Sanderson & Porter when answering question whether another person caused accident (164), thus leaving the Commission completely ignorant of the fact that a third party was involved—a fact not known by the Commission until nearly three months after the injury (McCluskey 123). There is no suggestion in the record that appellees advised these defendants-appellants that they intended to hold them as third parties until the appellee John E. Hubbell sought to make his October election. If the Moseley case, *supra*, is any authority for the contention that in Arizona one may be relieved of the consequences of an election under the Workmen's Compensation Act for reasons short of those generally recognized in courts of equity where rescission is sought, it also is authority for the proposition that such reasons must be proved as other issues. Here the intent and purpose of appellee John E. Hubbell in accepting compensation bene-

fits over a considerable period of time, always believing he had a claim founded on negligence against defendants-appellants, was necessarily a question of fact for the jury.

Specification No. 5

Argument hereunder would be superfluous. We call the Court's attention to our argument under Specifications 2(a), 2(b), 3 and 4.

It is respectfully submitted that the judgment should be reversed with instructions either (a) to enter judgment for the defendants-appellants or (b) grant a new trial as the Court may be advised.

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(Appendix follows)



APPENDIX

Article XVIII, Section 8, Arizona Constitution, reads:

“Section 8. (Workmen’s compensation.)—The legislature shall enact a Workmen’s Compensation Law applicable to workmen engaged in manual or mechanical labor in all public employment whether of the state, or any political subdivision or municipality thereof as may be defined by law and in such private employments as the legislature may prescribe by which compensation shall be required to be paid to any such workman, in case of his injury and to his dependents, as defined by law, in case of his death, by his employer, if in the course of such employment personal injury to or death of any such workman from any accident arising out of, and in the course of, such employment, is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its agents or employee or employees, to exercise due care, or to comply with any law affecting such employment; provided that it shall be optional with any employee engaged in any such private employment to settle for such compensation, or to retain the right to sue said employer as provided by this constitution; and, provided further, in order to assure and make certain a just and humane compensation law in the State of Arizona, for the relief and protection of such workmen, their widows, children or dependents, as defined by law, from the burdensome, expensive and litigious remedies for injuries to or death of such workmen, now existing in the state of Arizona, and producing uncertain and unequal compensation therefor, such employee, engaged in such private employment, may exercise the option to settle for compensation by fail-

ing to reject the provisions of such Workmen's Compensation Law prior to the injury.

"The percentages and amounts of compensation provided in House Bill No. 227 enacted by the seventh legislature of the state of Arizona, shall never be reduced nor any industry included within the provision of said House Bill No. 227 eliminated except by initiated or referred measure as provided by this constitution."

The following references are to Arizona Code Annotated, 1939:

Section 56-904, so far as pertinent, reads:

"The commission may adopt rules of procedure, rules for the fixing of rates, for the presenting of claims, and such other rules and regulations as are necessary for its business, and change the same from time to time. It may, in its name, sue and be sued in all actions or proceedings arising out of or relating to the state compensation fund."

Section 56-907, so far as pertinent, reads:

"The commission shall have full power, jurisdiction and authority to administer and enforce all laws for the protection of life, health, safety and welfare of employees in every case and under every law, where such duty is not now specifically delegated to any other board or officer, * * *".

Section 56-928 reads:

"56-928. Employers subject to law.—(a) Employers subject to the provisions of this article are: 1. the state, 2. each county, city, town, municipal corporation, and school district, and, 3. every person who has in his employ three (3) or more workmen or opera-

tives regularly employed in the same business or establishment, under contract of hire, except agricultural workers not employed in the use of machinery, and domestic servants; but exempted employers of agricultural workers or domestic servants, or employers of less than three (3) workmen or operatives, may come under the provisions of this article by complying with its provisions and the rules and regulations of the commission. For the purposes of this section 'regularly employed' includes all employments, whether continuous throughout the year, or for only a portion of the year, in the usual trade, business, profession, or occupation of an employer.

"(b) When an employer procures work to be done for him by a contractor over whose work he retains supervision or control, and such work is a part or process in the trade or business of the employer, then such contractors and the persons employed by him, and his subcontractor, and persons employed by the subcontractor, are within the meaning of this section, employees of the original employer.

"(c) A person engaged in work for another, and who while so engaged is independent of the employer in the execution of the work, not subject to the rule or control of the person for whom the work is done, but is engaged only in the performance of a definite job, or piece of work, and subordinate to the employer only in effecting a result in accordance with the employer's design, is an independent contractor, and an employer within the meaning of this section. (Laws 1925, ch. 83, sec. 44, p. 345; rev., R. C. 1928, sec. 1418; Laws 1945, ch. 33, sec. 1, p. 65.)

Section 56-930, so far as pertinent, reads:

“‘Order’ shall mean and include any rule, regulation, direction, requirement, standard, determination or decision of the commission; * * *

“‘Compensation’ shall mean the compensation and benefits provided herein;

“‘Award’ shall mean the finding or decision of the commission of the amount of compensation or benefit due an injured or the dependents of a deceased employee.”

Section 56-946, reads:

“56-946. Compensation exclusive remedy—Exceptions.—The right to recover compensation pursuant to the provisions of this article for injuries sustained by an employee shall be the exclusive remedy against the employer, except as provided in the two preceding sections, and except where the injury is caused by the employer’s wilful misconduct and such act causing such injury is the personal act of the employer himself, or if the employer be a partnership, on the part of one of the partners, or if a corporation, on the part of an elective officer thereof, and such act indicates a wilful disregard of the life, limb, or bodily safety of employees, such injured employee may, at his option, either claim compensation or maintain an action at law for damages. The term “wilful misconduct” as employed in this section shall be construed to mean an act done knowingly and purposely with the direct object of injuring another. (Laws 1925, ch. 83, sec. 65, p. 345; rev., R.C. 1928, sec. 1432.)”

Section 56-949, reads:

“56-949. Liability of third person to injured employee.—If an employee entitled to compensation hereunder is injured or killed by the negligence or wrong

of another not in the same employ, such injured employee, or in case of death, his dependents, shall elect whether to take compensation under this title or to pursue his remedy against such other. If he elect to take compensation, the cause of action against such other shall be assigned to the state for the benefit of the compensation fund, or to the person liable for the payment thereof, and if he elect to proceed against such other, the compensation fund or person, shall contribute only the deficiency between the amount actually collected and the compensation provided or estimated herein for such case. Compromise of any such cause of action by the employee or his dependents at an amount less than the compensation provided for herein shall be made only with the written approval of the commission, or of the person liable to pay the same. (Laws 1925, ch. 83, sec. 66, p. 345; rev., R. C. 1928, sec. 1435.)”

Section 56-950, reads :

“56-950. Election of remedy—Waiver.—Every employee, or his legal representative in case death results, who makes application for an award, or with the consent of the commission accepts compensation from an employer, waives any right to exercise any option to institute proceedings in any court. Every employee or his legal representative in case death results, who exercises any option to institute proceedings in court waives any right to any award or direct payment of compensation from his employer. (Laws 1925, ch. 83, sec. 67, p. 345; R. C. 1928, sec. 1436.)”

Section 56-971, reads :

“56-971. No injunction to issue—Exception.—No injunction shall issue suspending or restraining any order, award, classification, or rate adopted by the

commission, or any action of any officer required by the provisions hereof, except as herein provided; but nothing herein shall affect any defense to an action brought by the commission or the state in pursuance of the authority contained herein. (Laws 1925, ch. 83, sec. 88, p. 345; rev., R. C. 1928, sec. 1451.)”

Section 56-972, reads:

“56-972. Appeal to Supreme Court.—Within thirty (30) days after the application for a rehearing is denied, or if the application is granted within thirty (30) days after the rendition of the decision on the rehearing, any party affected thereby may apply to the Supreme Court of the state for a writ of certiorari to review the lawfulness of the award. Such writ shall be made returnable within thirty (30) days, and shall direct the commission to certify its record, proceedings and the evidence to the court. On the return day the cause shall be heard in the court unless for good cause continued, and shall be heard on the record of the commission as certified by it. The review shall be limited to determining whether or not the commission acted without or in excess of its power; and, if findings of fact were made, whether or not such findings of fact support the award under review. If necessary the court may review the evidence:

“The commission and each party to the proceeding before the commission may appear in the review. The court shall enter judgment either affirming or setting aside the award. The rules of civil procedure relating to certiorari shall, so far as applicable, and not in conflict herewith apply. (Laws 1925, ch. 83, sec. 90, p. 345; rev., R. C. 1928, sec. 1452.)”

No. 12,594

IN THE

United States
Court of Appeals

For the Ninth Circuit

TUCSON GAS, ELECTRIC LIGHT AND POWER
COMPANY, a Corporation,

and

THE INDUSTRIAL COMMISSION OF ARIZONA,
a Public Agency,

Intervenors-Appellants,

vs.

JOHN E. HUBBELL and WILMA HUBBELL,
Appellees.

Intervenors-Appellants' Opening Brief

Appeal from the United States District Court
District of Arizona

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IN THE

United States
Court of Appeals

For the Ninth Circuit

TUCSON GAS, ELECTRIC LIGHT AND POWER
COMPANY, a Corporation,

and

THE INDUSTRIAL COMMISSION OF ARIZONA,
a Public Agency,

Intervenors-Appellants,

vs.

JOHN E. HUBBELL and WILMA HUBBELL,
Appellees.

Intervenors-Appellants' Opening Brief

Appeal from the United States District Court
District of Arizona

Hon. CLAUDE MCCOLLOCH of Oregon Presiding

Upon suggestion of Defendants-Appellants we have accepted their styling of the parties to this appeal.

There is but one transcript; figures in parentheses used herein refer to transcript pages; all emphasis used in the Brief, unless otherwise shown, is by the writer.

I.

JURISDICTIONAL STATEMENTS

In view of the fact that this appeal on the part of both appellants is primarily based upon the jurisdiction of the trial court, these factors are critical.

Appellate Court.

The jurisdiction of this court is based on Sections 1291 and 1294 (1), United States Code, Ann., and Rules 50, and 72 to 76, inclusive, of the Rules of Civil Procedure of the District Courts.

District Court.

The apparent jurisdiction in the District Court was based upon diversity of citizenship of the original parties; and an amount involved in excess of Three Thousand Dollars.

The defendants-appellants were residents of New York. The appellee-plaintiff was a resident of Arizona, county of Pima. The intervenor-defendant, Tucson Gas, Electric Light & Power Company, is a public utility, authorized and qualified to do business in Arizona; and The Industrial Commission of Arizona is a public agency created under the Constitution and Laws of Arizona to administer the Arizona State Compensation Fund and the Arizona Workmen's Compensation and Occupational Disability Laws. It has powers to sue and be sued in its own name.

The plaintiff, John E. Hubbell, an employee of Tucson Gas, Electric Light & Power Company, filed a case in the Superior Court of the State of Arizona, in and for the County of Pima (T.R. 6), served complaint and summons upon the defendants-appellants (T.R. 17, 19). The com-

plaint disclosed diversity of citizenship of the original parties, and the amount prayed for was in excess of \$3,000.00. Defendants-appellants filed a petition for removal to the United States District Court for the District of Arizona, Tucson Division (T.R. 2, 5), together with jurisdictional bond (T.R. 20, 23), Notice thereof (T.R. 23, 24), and acknowledgment of service (T.R. 24, 25), and motion to dismiss for lack of jurisdiction on several grounds (T.R. 25, 26).

Thereafter intervenors-appellants filed a motion for leave to intervene (T.R. 27), together with a verified answer (T.R. 27, 35), and with Exhibit B (T.R. 35, 48) a motion to dismiss and a motion for summary judgment (T.R. 48, 51); and it was stipulated that the answer and motion for summary judgment would be deemed to be duly verified for all purposes (T.R. 54), and which challenged the jurisdiction of the court on several grounds (T.R. 6, 12, 25, with Exhibit 13, T.R. 16).

The motion for leave to intervene, pursuant to stipulation of the parties, was allowed (T.R. 51, 52; item 10,192).

Defendants-appellants joined in the intervenors-appellants' motion for summary judgment (T.R. 55).

The court denied the motions to dismiss, and for summary judgment (T.R. 55, 56, 149).

After the jury was empanelled and sworn, plaintiff offered to stipulate that The Industrial Commission of Arizona had a lien on any judgment for the plaintiff in the amount of \$1,659.19, and counsel was directed by the Court that he might file a written stipulation (T.R. 66) which was subsequently filed (T.R. 64, 65, 161).

Plaintiff also moved (T.R. 66) to strike paragraph 1 of the prayer of the complaint (T.R. 9, 12), which was ob-

jected to by intervenors-appellants (T.R. 66). The motion was granted (T.R. 160, 161). The prayer asked that the award as an election of remedies be set aside.

The case was tried before a jury—the court removing from the jury three questions:—

1. The legal effect of a written contract between Tucson Gas, Electric Light & Power Company and defendants-appellants as to whether the written contract constituted an independent contract;

2. The legal effect of the filing of a claim for compensation by the plaintiff, and the acceptance and retention of, compensation benefits, as an election of remedies under the Arizona Workmen's Compensation Law (T.R. 149,155); and

3. The legal effect of failure to appeal the award to the Supreme Court.

The jury assessed damages in the amount of \$50,000.00 against defendants-appellants; and the court, in the judgment, impressed a lien in favor of The Industrial Commission of Arizona in the amount of \$1,659.19 (T.R. 80, 81).

Intervenors-appellants moved for an instructed verdict at the close of plaintiff's case (T.R. 68), and renewed the same at the close of all the evidence (T.R. 70, 144, 148) and after verdict, filed a motion to set the verdict aside, and for judgment notwithstanding the verdict, under Rule 5, Rules of Civil Procedure of the District Courts (T.R. 82, 83, 193), which were denied (T.R. 163).

Intervenors-appellants, being satisfied that the determination of the legal effect of the contract and the election of remedies were questions of law rather than questions of fact for the jury, did not file a motion for new trial.

Notice of appeal and bond (T.R. 93) and points or specifications relied upon by intervenors-appellants were filed (T.R. 94, 96, 206, 208).

STATEMENT OF CASE

The complaint alleged John E. Hubbell was employed by Tucson Gas, Electric Light & Power Company, a corporation, as a line-man; that he sustained personal injuries when he came in contact with an uninsulated wire carrying 12,500 volts of electricity, which he alleged was due to the negligence of Sanderson & Porter, whom he alleged to be independent contractors for his employer; that plaintiff was not informed that the wires and bars on the power station upon which he was working had been activated. The evidence established negligence and the amount of the judgment under all the facts, if the court had jurisdiction to render the same, was not excessive.

The record conclusively shows that on June 17, 1949, appellee sustained an injury by accident arising out of and in the course of his employment. His employer, Tucson Gas, Electric Light & Power Company, filed an employer's first report on July 9, 1949, reporting the accident (plaintiff's Exhibit 10, T.R. 170, 171). The initial report of the attending physician (intervenors-defendants' Exhibit A-B) was filed on July 6, 1949 (T.R. 190).

The appellee, on the 6th day of July, 1949, filed a workman's claim for compensation for injury or occupational disease (Plaintiff's Exhibit 6, T.R. 164), which was received by the Industrial Commission on July 9, 1949. Appellee's claim was docketed by the Commission as Claim No. A.E. 1063 (T.R. 164), and pursuant to Rule 28, Rules of Procedure before The Industrial Commission of Arizona adopted

pursuant to statute (T.R. 189)—in the absence of any showing in any of the three instruments that an “independent contractor” or third-party was involved—the Commission made findings and order accepting the claim as compensable, and awarding the applicant “accident benefits” (which represent medical and hospital care) and compensation benefits (T.R. 186), pursuant to which award compensation benefits were paid (T.R. 175) upon the original claim (T.R. 164) and supplemental claims (T.R. 165, 167, inc., and 177, 185, inc.), and until such time as the appellee failed to file supplemental claims pursuant to the Rules of the Commission; and until such time as the appellee filed an instrument entitled: “Election of Remedy in Matter Involving a Third Party Defendant”, under Section 56-949, A.C.A. 1939 (T.R. 108, 110, 168, 169), following which a check already drawn was temporarily withheld pending the filing of a proper supplemental claim (T.R. 52, 53; 175).

In an instrument filed November 12, 1949, appellee purported to elect to sue the alleged third party for damages and to claim any deficiency in the amount recovered in any judgment and the amount he would be entitled to under the Arizona workmen’s compensation law—despite the provisions of Sections 56-949, 56-950, A.C.A. 1939; and the Rules of the Commission adopted pursuant to statute relating to third party actions. (Intervenors’ Exhibits A,A, Rules 70, 76, inc., and more particularly Rule 72, which reads: “The acceptance of compensation from the Commission or other insurance carrier shall be deemed to be an election to take compensation”, which is a rescript of the last paragraph of Section 56-950, A.C.A. 1939). Appellee’s justification, if any, is set out in T.R. pages 105 to 109.

The defendants-appellants, by their answer, admitted that appellee John E. Hubbell was an employee of Tucson Gas, Electric Light & Power Company, and was working in that capacity at the time he was injured. They denied that they were engaged as independent contractors, and alleged that the defendants-appellants were agents of, and were employed by Tucson Gas, Electric Light & Power Company, and subject to the right of supervision and control by said company. They denied negligence, and plead contributory negligence. Defendants-appellants also invoked the provisions of Section 56-946, A.C.A. 1939, which made the Workmen's Compensation Law the exclusive remedy of the appellee and the provisions of Section 56-949, A.C.A. 1939, which excludes any remedy other than the Workmen's Compensation Law as against a co-employee or fellow-workman; and further contended that even though a cause of action would lie against a fellow-workman, appellee had waived that remedy by claiming, accepting, and retaining compensation benefits under the Arizona Workmen's Compensation Law (Sections 56-949; 56-950, A.C.A. 1939); or in failing to have the award set aside by appeal to the Supreme Court of Arizona. The answer of intervenors-appellants presented substantially the same defenses.

EXPLANATORY STATEMENT

In view of the posture of the case at the time plaintiff rested, it did not appear to intervenors-appellants that a valid objection, based on legal error, would lie to the arbitrary and insulting conduct, and the rulings, of the trial judge, made at the threshold of the trial, as set out in pages 100, 102 of the Transcript of Record. And, we do

not, at this time, feel that they constitute reversible error as a basis for this appeal. Apparently, the court reconsidered its opinions (T.R. 149) in over-ruling plaintiffs' motion to dismiss intervenors.

We respectfully suggest, however, that such conduct does not command that degree of respect for members of the Federal judiciary which, in so far as we know, all members of the Arizona Bar accord to the judges of our courts.

The matter is referred to here for the reason that it reflects the prejudicial viewpoint of the court on the main issue under consideration before the court had heard any evidence whatsoever. We think the matter is material in evaluating the weight which this Court shall give to the opinion of the trial court in construing the legal effect of the written contract; and of the Election of Remedies—as to which we contend the court erred in its rulings on the legal effect thereof.

POINTS OF ERROR RELIED ON BY APPELLANTS THE INDUSTRIAL COMMISSION OF ARIZONA

Appellants, intervenors-defendants herein, submitted and filed Points or Specifications of Error (T.R. 94, 206) upon which they intend to rely on appeal in the Circuit Court of Appeals, for the Ninth Circuit, in the above entitled matter; and herewith present the same:

Point or Specification of Error No. 1

The court erred in denying intervenors-defendants' motion for judgment notwithstanding the verdict, and entering final judgment for plaintiffs on the grounds that there is not an iota of competent evidence, or any inference that

a reasonable man might draw from the record as a whole, to support the allegation of the complaint, or the implied findings of fact—independent of the jury—and legal conclusions of the trial judge, in effect holding that the defendants were in fact and in law “independent contractors.”

Point No. II

The court erred in denying intervenors-defendants’ motion for judgment notwithstanding the verdict and entering final judgment for plaintiffs, on the grounds that there is not an iota of competent evidence, or any inference that a reasonable man might draw from the record as a whole, to support the allegation of the complaint, or the implied findings of fact—independent of the jury—and legal conclusions of the trial judge, that the provisions of the Workmen’s Compensation Law were not the exclusive remedy of the plaintiff; and in effect holding that the plaintiff, and the respective defendants were not fellow employees of defendants-intervenors, Tucson Gas, Electric Light & Power Company.

Point No. III

The court erred in denying intervenors-defendants’ motion for judgment notwithstanding the verdict, and entering final judgment for plaintiffs, on the grounds that there is not an iota of competent evidence, or any inference that a reasonable man might draw from the record as a whole to support the allegation of the complaint, or the implied findings of fact—independent of the jury—and legal conclusions of the trial judge—assuming that defendants were in fact and in law independent contractors—that plaintiff had not made a valid election of remedy under the Work-

men's Compensation Law; and that his cause of action, if any, by operation of law was not automatically assigned to the State for the benefit of the State Compensation Fund; and that the plaintiff was not estopped from prosecuting this action.

SUCCINCT STATEMENT OF QUESTIONS INVOLVED

The crux of the case, and of this appeal, is that both defendants-appellants and intervenors-appellants contend that John E. Hubbell and defendants Taylor, et al., were persons in the employ of, and subject to the right of supervision and control of the intervenor-appellant, Tucson Gas, Electric Light & Power Company; that all liability of the Power Company under the Arizona Workmen's Compensation Law for both parties was insured in the Arizona State Compensation Fund, administered by The Industrial Commission of Arizona; and that the exclusive remedy of the plaintiff for his injuries, under all of the pleadings, the evidence, and the law, was under the Arizona Workmen's Compensation Law; pursuant to the provisions of Section 56-946, A.C.A. 1939; and that, even though Sanderson & Porter were in truth, and in fact, independent contractors (which is expressly denied) any remedy appellee might originally have had against defendants-appellants became vested, as a matter of law in The Industrial Commission of Arizona, under the provisions of Sections 56-928, 56-929, 56-946, 56-949 and 56-950, A.C.A. 1939. And that, appellee having filed a claim for, and having been awarded, and accepted, and retained, medical, hospital, and compensation benefits under the Arizona Workmen's Compensation Law, appellee—in the absence of over-reaching, or fraud, which

was neither alleged nor proven—could not rescind his election of remedy to take compensation benefits. And that the only court having jurisdiction to vacate the award was the Supreme Court of Arizona (Section 56-972, A.C.A. 1939). On these issues which the court did not submit to the jury, but ruled on as propositions of law, we contend the court is clearly in error as a matter of law.

These issues were repeatedly and properly tendered on motion for summary judgment before trial; and on motions for an instructed verdict at the close of plaintiffs' evidence; after all of the evidence; and on motions to set aside the verdict.

The issue presented therefore is that the court was without jurisdiction in the premises and the judgment is void.

ARGUMENT

Points Nos. I and II

The law is well settled in Arizona that the status of employer and employee is regulated by statute and that no contract made within or without the state of Arizona can alter such status.

Ocean Accident & Guaranty Corp. v. Industrial Commission, 32 Ariz. 275, 257 Pac. 644, cited with approval

Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 87 L.Ed. 782, 63 Sup. Ct. 602, at 605 (footnote);

Industrial Commission v. Navajo County, 64 Ariz. 172, 167 P.(2d) 113.

Section 56-928, A.C.A. 1939, in so far as applicable, defines an employer as follows:

“ * * *

(a) * * * every person who has in his employ three (3) or more workmen or operatives regularly employed in the same business or establishment, under contract of hire * * *

(b) When an employer procures work to be done for him by a contractor over whose work he retains supervision or control, and such work is a part or process in the trade or business of the employer, then such contractors and the persons employed by him, and his sub-contractor, and persons employed by the sub-contractor, are within the meaning of this section, employees of the original employer.

(c) A person engaged in work for another, and who while so engaged is independent of the employer in the execution of the work, not subject to the rule or control of the person for whom the work is done, but is engaged only in the performance of a definite job, or piece of work, and subordinate to the employer only in effecting a result in accordance with the employer's design, is an independent contractor, and an employer within the meaning of this section.

* * * ”

Section 56-929, A.C.A. 1939, in so far as applicable, provides as follows:

“ * * *

(a) In this article, unless the context otherwise requires, the terms ‘employee,’ ‘workman,’ and ‘operative’ mean * * * every person in the service of any employer subject to the provisions of this article, including aliens and minors legally or illegally permitted to work for hire, but not including a person whose employment is casual and is not in the usual course of trade, business or occupation of the employer.”

Under the provisions of Section 56-932, A.C.A. 1939 it is the mandatory duty of the employer to insure all employees in his service before putting them to work.

Under the provisions of Sections 56-944 and 56-945, A.C.A. 1939, an employer who provides insurance as provided by Section 56-932, *supra*, and posts notices giving notice to his employees that such insurance has been provided, under Section 56-944, *supra*, and that the employee is given the right to reject such insurance and the provisions of the compensation law, upon written forms to be maintained by the employer, and filing the same with the employer, who must file a copy thereof with The Industrial Commission of Arizona. If the employee fails to reject the provisions of the compensation law and the insurance, in writing, in the manner provided by Section 56-944, *supra*, the compensation law becomes his exclusive remedy against the employer—unless the employer shall wilfully and intentionally injure the employee, or has failed to post notices of compliance under the provisions of the Act, and kept forms available for the rejection of the Act, under the provisions of Section 56-946, A.C.A. 1939; and with the further exceptions:

“Section 56-949. * * * If an employee entitled to compensation hereunder is injured or killed by the negligence or wrong of another *not in the same employ*, such employee, or in the case of his death, his dependents, shall elect whether to take compensation under this title or pursue his remedy against such other. If he elect to take compensation, the cause of action against such other shall be assigned to the state for the benefit of the compensation fund, or to the person liable for the payment thereof, and if he elect to proceed against such other, the compensation fund or person, shall contribute only the deficiency between the amount actually collected and the compensation provided or estimated herein for such case. Compromise

of any such cause of action by the employee or his dependents at any amount less than the compensation provided for herein shall be made only with the written approval of the commission, or of the person liable to pay the same. * * *

Section 56-950, A.C.A. 1939, provides :

“Election of remedy; waiver. Every employee, or his legal representative in case death results, who makes application for an award, or with the consent of the commission accepts compensation from an employer, waives any right to exercise any option to institute proceedings in any court. Every employee or his legal representative in case death results, who exercises any option to institute proceedings in court waives any right to any award or direct payment of compensation from his employer.”

Under the provisions of Section 56-921, A.C.A. 1939 the Commission is given power to insure the entire underlying liability of the employer, not only for compensation claims, but for all liability claims whatsoever by employees, or their dependents, including the defense of an action. If a policy is issued it includes the duty to insure a contractor or an agent, as defined by Section 56-928 (b), *supra*.

West Chandler Farms Co. v. Industrial Commission,
64 Ariz. 383, 173 P.(2d) 84

and also includes the power to contract to insure a person whose status might be determined to be that of an independent contractor or an agent.

Burke, et al. v. Industrial Comm. of Utah, 75 Utah
441, 286 Pac. 623;

L. B. Price Mercantile Co. v. Industrial Commission,
43 Ariz. 257, 30 P.(2d) 491;

U. S. Fidelity & Guaranty Co. v. Industrial Commission, 42 Ariz. 422, 26 P.(2d) 1012;

West Chandler Farms Co. v. Industrial Commission,
(supra).

The reasonableness and necessity for this power is clearly indicated by:

Arizona Binghampton Copper Co. v. Dixon, 62 Ariz.
163, 195 Pac. 538, 44 A.L.R. 881, Ann. 891, 904;

S. H. Kress & Co. v. Industrial Commission, 38 Ariz.
330, 299 Pac. 1034;

Scott v. Prescott Sanitary Laundry Co., 46 Ariz.
138, 47 P.(2d) 440;

West Chandler Farms Co. v. Industrial Commission,
(supra).

The Industrial Commission, by its rules promulgated pursuant to Sections 56-920, 56-921, 56-922, A.C.A. 1939, issues a standard form of policy of insurance in the State Compensation Fund which provides, in part:

“14. It is understood by the applicant, subject to agreement by The Industrial Commission of Arizona, by the issuance of its policy, that the legal status of persons now employed, or who subsequently enter the employ of the applicant, may be uncertain. The applicant agrees, as an inducement to The Industrial Commission of Arizona, for the issuance of this policy, and as a partial consideration to avoid a *twenty-five 25% acceleration in rates—which The Industrial Commission has determined would be necessary if frequent inspections and audits are required to service the said*

The written contract, and supplements thereto, entered into between Tucson Gas, Electric Light & Power Co. and Sanderson & Porter did not abridge any statute. It was a contract they had a right to enter into (Exhibit B, T.R. 35, 48, inc.).

There is no allegation in the complaint that the contract was made to defraud the appellee, or anyone else; nor was there any evidence to support such a premise. Such allegations are jurisdictional.

Brazee v. Morris, 65 Ariz. 291, 179 P.2d 442; 68 Ariz. 224, 204 P.2d 475.

All parties affected by the contract construed it, at all times, as a contract of agency under which Sanderson & Porter were under the right of supervision and control of the Power company for all purposes. See testimony of appellees' witness Lovell (T.R. 112, 119); and of defense witnesses J. R. Snider, president and general manager of the Power company (T.R. 127, 132), and John H. Saunders (T.R. 132, 136), R. E. Dunn (T.R. 134, 135), and of Herman Broockmann (T.R. 136, 141), except appellee after his discharge from the hospital (T.R. 105, 109).

There is no conflict in the evidence given by these men, or in the fair inferences to be drawn therefrom, or from the contract—which can support any inference—except that it was the intent of the parties that Sanderson & Porter were agents, or contractors, under the right of supervision and control of the Power company; and that the only tenable legal conclusion is that their status was regulated by the provisions of Section 56-928(b), *supra*.

We contend even if they were not independent contractors that the intervenor, having procured a policy of in-

surance under the Workmen's Compensation Law, and the defendants, not having rejected the same, they became "co-employees" with the appellee so as to bar them from suing one another, under the provisions of Section 56-949, A.C.A. 1939, under the principles of estoppel.

West Chandler Farms Co. v. Industrial Commission,
64 Ariz. 383, 173 P.2d 84.

The case of *S. H. Kress & Co. and Clarence L. Wise v. Superior Court of Maricopa County*, 66 Ariz. 67, 182 P.2d 931, involved a suit brought by a minor through his guardian ad litem against S. H. Kress and Company, and its assistant manager, Clarence L. Wise. The issues tendered were that Clarence L. Wise, as assistant manager for the Kress company, unlawfully employed and permitted a minor to perform services for the store and to operate an elevator, such employment being prohibited by the Constitution, and the child labor laws, of the State of Arizona. The jurisdiction of the Superior Court to entertain the suit was challenged on three grounds:

1. That the employee, even though he was a minor, was bound by the compensation law, having failed to elect to reject the same;
2. That he had personally, and through his maternal parent, applied for, been awarded, received and retained, benefits under the workmen's compensation law; and
3. That the compensation law was his exclusive remedy against the employer, and also against Clarence L. Wise, his co-employee.

The Superior Court of Maricopa County assumed jurisdiction—despite these facts—in an action in damages against both the Kress company and Wise. An alternative writ of prohibition was obtained and, after hearing, and argument, was made pre-emptory. The court held that despite the fact that the employee was unlawfully permitted to work, in violation of the Constitution, and the child labor laws, he was emancipated under the provisions of Section 56-929, *supra*, for the purposes of his “regulated status” under the workmen’s compensation law; and his failure to reject the same before injury constituted the workmen’s compensation law his exclusive remedy.

The case is apposite on every factor here presented except that Wise was a “co-employee” instead of an alleged “independent contractor.”

There are probably no two words in our language which are more confusing than the phrase “independent contractor.” This fact was clearly recognized by the late Justice Cardozo when he was a member of the Circuit Court of Appeals of the State of New York, in *Gliemi v. Netherlands Dairy Company*, 171 N.E. 907, wherein he referred to the phrase, as used in *Singer Sewing Machine Co. v. Rahn* (1889), 132 U.S. 510; 10 Sup. Ct. 175; 33 L.Ed. 440; as “mystifying words.”

It is noted that this phrase which has led to a confusion of tongues has been severely criticized. See *American Bar Association Journal*, Vol. 34, No. II, pages 126, 127, for February, 1948, and the cases therein discussed.

In *Workmen’s Compensation Text*, *Schneider*, Vol. 4, Permanent Edition, page 10, it is suggested:

“Has not the confusion of tongues in the decisions under workmen’s compensation statutes arisen be-

cause the courts have failed to appreciate that independent contractorship does not extend to continuous work normally a part of the employer's business, but only to a definite job usually performed by one who has his own business for such work, and who could not be discharged without incurring liability before the work was finished."

The question of the "degree of control" where professional men, or skilled mechanics, are concerned is frequently more technical than real and the courts have so recognized that fact. *Industrial Commission v. Navajo County*, supra; and *Ex Parte Terry*, 211 Ala. 418; 100 Southern 768, wherein it was said:

"Undesirable, indifferent, and of little value, indeed, are the services of an employee who must be expressly directed as to the time, manner, and extent of doing each particular task."

The above citation has been quoted with approval in *State ex rel Duluth Brewing Co. v. District Court*, 129 Minn. 176; 151 N.W. 912, and in *Pittsburgh Plate Glass Co. v. Morris* (Okla.) 62 Pac.(2) 645.

Likewise, the test of the right of quitting employment without penalty is of doubtful weight, as was said by the Supreme Court of California, in *Drillon v. Industrial Accident Commission*, 17 Cal.(2) 346, 110 P.2d 64, at 69; wherein the court said:

"It would not be doubted that in many instances a servant would suffer penalties for refusing to perform his contract of employment in addition to his liability to his master for damages. An airplane pilot, regularly employed to operate a passenger plane, would certainly be subject to dire penalties if he should de-

cide to quit, don his parachute, jump, and abandon the shipful of passengers in mid-air; nevertheless, he is unquestionably *not an independent contractor*."

The agency contract did not contain any penalty if Sanderson & Porter quit the job.

Stripped of its habiliments, with which it has been clothed in the literature of the law, the phrase "independent contractor" is a device apparently originated by the courts,

Singer Sewing Machine Co. v. Rahn, (supra)

and adopted by the legislatures to re-instate, in part, as defenses, the common law doctrines of the assumption of risk and fellow-servant which were abrogated, or devitalized, by the force of public opinion, constitutional provisions (Article XVIII, 3, 4, and 5, Constitution of Arizona), and by statute (Articles 9 and 12, Chapter 56, A.C.A. 1939).

Arizona Hercules Copper Co. v. Crenshaw, 21 Ariz. 15, 184 Pac. 996.

The Supreme Court of Arizona has recognized the apparent conflicts—even in its own decisions. In *West Chandler Farms Co. v. Industrial Commission*, 64 Ariz. 383; 173 P.2d 84; in construing the term "independent contractor" the court said:

"The court has had occasion to consider the above provision in determining whether a contractor was an employer or an employee. *There would appear to be considerable conflict in the decisions*. We think, however, that the statements of the court in *Grabe v. Industrial Comm.*, supra, and in *Alexander v. Alexander*, 51 Ariz. 269; 76 P.2d 223, are determinative of the situation here. In the former case it was said (38 Ariz. 322; 299 Pac. 1034):

‘Under section 1418 supra (56-928, A.C.A. 1939) if A procures B to do certain work for him which is a part or process in A’s trade or business, and retains supervision or control over the work, then B and all B’s employees and subcontractors to the nth degree are, for the purposes of the Compensation Act, employees of A, no matter what the terms or method of employment or compensation. It is obvious that were this not so the beneficent purposes of the act could and would be easily defeated or evaded by unscrupulous employers through the aid of various dummy intermediaries. The statute therefore brushes aside all forms and subterfuges and provides that one just, simple, and definite test. If the work be part of the regular business of the alleged employer, does he retain supervision or control thereof? All other matters are of importance only as they throw light on this question’.”

In *Blasdel v. Industrial Commission*, 65 Ariz. 373; 181 P.2d 620, the court said:

“The body of law concerned with distinguishing independent contractors from employees is, indeed, huge. And though no hard and fast rule can be set forth, but instead each case must be determined by the sum total of its own facts, the general test laid down by our statute (Sec. 56-928) and by the great weight of authority is whether the alleged employer ‘retains supervision or control over the method of reaching a certain result, or whether his control is limited to the result reached, leaving the method to the other party.’ *United States Fidelity & Guaranty Co. v. Industrial Commission*, 42 Ariz. 422; 26 P.2d 1012, 1015. In order to apply this test and so determine the extent of this ‘right of control,’ courts look for a variety of sign-

posts or indicia none of which are in themselves conclusive but which when taken together and applied to a particular set of facts, aid in making the line to be drawn more clear. *Lee Moor Contracting Co. v. Blanton*, 49 Ariz. 130; 65 P.2d 35; *Consolidated Motors v. Ketcham*, 49 Ariz. 295; 66 P.2d 246; *Industrial Commission v. Meddock*, 65 Ariz. 324; 180 P.2d 580."

We respectfully contend that the intent of the compensation law is to include and not exclude persons in the service of an employer; that the standard policy of insurance, an excerpt from which was heretofore quoted (Item 14 of the Application for Policy) establishes the construction placed thereon by the Industrial Commission; that the parties by their agency contract intended that their relationship was not to be that of an owner-independent contractor, but of principal and agent. That their procedure under the operation of the contract was the relationship of employer and employee; that there is not an iota of evidence to the contrary; and that all the evidence does not warrant an inference, either in fact, or in law, to sustain the legal conclusion apparently reached by the trial court.

The fact that the officers of the Power company did not give orders directly to workmen employed on the construction project affords no reasonable inference that they did not have the right to do so. The uncontradicted evidence is that the Power company had such right and exercised it (T.R. 141). Their wisdom in refraining from giving direct orders to workmen—aside from the union rules (T.R. 141) is dramatically sustained by the accident in this case. Where dangerous instrumentalities are in operation supervision must be in a direct line with no divided or dual authority (Testimony of Granville Gibson, T.R. 110, 112).

Argument**Point No. III**

Page 149 of the Transcript of Record contains these rulings of the court:

“Mr. Morris Udall: I would like to make a motion, there having been no showing the Industrial Commission of Arizona and Tucson Gas, Electric Light & Power Company are proper parties in this case; the proof having shown there was no election, there was no award, we ask the Court to dismiss as to those parties. We so move at this time.

“The Court: * * *

I have plaintiff's motion directed against Mr. McCluskey's client and that motion is denied.

* * * * *

We are in doubt, as apparently are the other parties to the case, as to the effect of this ruling:

(a) whether the court merely held that we were proper parties; or (b) whether it also held that there was no valid election of remedy.

If the court intended to hold that we were proper parties and that there was a valid election of remedy, then there would be no foundation for the judgment. The fact that the court immediately submitted the matter to the jury leaves only one conclusion, i.e., that the ruling was only to the effect that intervenors-defendants were proper parties; this interpretation is confirmed by the fact that motion for judgment notwithstanding the verdict was denied.

We think it is elementary that this case must be controlled by the Arizona statute.

The applicable sections are Sections 56-946, 56-949, 56-950, the last sentence of Section 56-967, and Section 56-972, A.C.A. 1939.

Under the Arizona Workmen's Compensation Law it is provided:

"* * * no application shall be valid or claim thereunder enforceable unless filed within one (1) year after the date upon which the injury occurred or the right thereto accrued." (Section 56-967, A.C.A. 1939)

The appellee, therefore, had a full year from the date of injury to determine which remedy, if any, he desired to invoke. No one could compel him to act before he was ready, or before he could consult counsel.

In his complaint the appellee alleged that:

"* * * on or about July 6, 1949, without any request by the plaintiffs, the Commission forwarded to said plaintiff, John E. Hubbell, application forms for compensation under said law; that while still hospitalized and without means to support his family, and acting without advice of counsel, the said John E. Hubbell filled out these forms and sent them to the said Commission * * *." (T.R. 11).

This allegation, or evidence offered in support of it, affords no valid grounds for rescission.

The application forms were mailed to the appellee under the usual procedure of the Commission (T.R. 122).

Appellee's claim was dated July 6, 1949, and was filed with the Commission on July 9, 1949 (T.R. 164); the employer's report was dated June 22, 1949, and filed with the Commission on July 9, 1949 (T.R. 170); the physician's initial report dated June 23, 1949, and filed July 9, 1949

(T.R. 190). There is no reference in any of the three instruments that any third party was involved. Nor was there any reference to a third party in subsequent claims filed by appellee (T.R. 108, 109).

The Commission, under the provisions of the Statute, and rules made pursuant thereto, entered its findings and order awarding "accident benefits" and "compensation" to the applicant (T.R. 186). He received and retained the said benefits (T.R. 175).

The appellee never filed a proceeding in certiorari to set the award aside under Section 56-972, A.C.A. 1939, which is jurisdictional.

The first intimation that there might be a third party involved is contained in the evidence of plaintiffs' witness, H. S. McCluskey (T.R. 123, 124). Following the conference therein referred to under date of September 17, 1949, appellee declined to file any further supplemental claims for compensation benefits, and did file an instrument purporting to be an election of remedies (T.R. 168). Appellees' explanation is set out in Transcript of Record at pages 108, 109.

Following the filing of this instrument the Commission caused an investigation to be made, and reached the conclusion that the exclusive remedy of the appellee was under the workmen's compensation law, and upon request of appellee (T.R. 108) suspended further payments awaiting such time as appellee filed a valid monthly claim. Appellee testified: "I withdrew my claim of September 14, 1949, after my attorneys had advised me I could sue Sanderson & Porter" (T.R. 108).

The action of the Commission in the premises was further evidenced by the filing of the Motion for Leave to Intervene (T.R. 27) and by the Answer and Motion for Summary Judgment filed contemporaneously therewith (T.R. 26-51, inc.).

In connection with his claim for compensation plaintiff testified (T.R. 108, 109) :

“* * * At all times while drawing compensation I thought I had the right to sue Sanderson & Porter and also accept the compensation. With reference to Plaintiff's Exhibit No. 6, which is the original claim for compensation, I signed this blank but I did not fill it out. It was filled out by a member of the Tucson Gas Company and I do not know why there were blanks left after the questions, “Was accident caused by another person,” and “If so, by whom.”

“I knew Sanderson & Porter were in the picture and I intended to prosecute an action against them and this is true as to the subsequent claims I signed and submitted to the Commission. I did not suspect I was not entitled to both until I consulted my lawyer.”

Further testimony in this connection is set out in the Transcript of Record (at pages 106 to 109, inc.).

We emphasize that petitioner had a whole year after injury to determine what he wanted to do (Section 56-967, A.C.A. 1939, *supra*). Appellee was charged with the duty to know the law under which he claimed benefits. He had notice of facts which would put a man of ordinary prudence and intelligence on inquiry which is equivalent to knowledge of all the facts which a reasonably diligent inquiry would disclose, *Maricopa Utilities Co. v. Cline*, 60 Ariz. 209, 134 P.(2d) 156.

There is no allegation in the complaint that he was overreached; or that any fraud was practiced upon him; and there is no evidence thereof. The claim was handled in a routine manner under the procedure of the Industrial Commission of Arizona. We, therefore, contend that the sections of the statute heretofore quoted are conclusive on the matter of his election of remedies, if any there be.

These statutes have been construed and applied by the Supreme Court of Arizona in *S. H. Kress & Co. and Clarence L. Wise v. Superior Court of Maricopa County*, supra; *Moseley v. Lily Ice Cream Co.* (1931), 38 Ariz. 417; 300 Pac. 958; *Industrial Commission v. Nevelle* (1941), 58 Ariz. 325; 119 P.(2d) 934; *Weaver v. Martori* (1949), 69 Ariz. 45; 208 P.(2d) 652.

The case of *S. H. Kress & Co. and Clarence L. Wise*, supra, is most nearly in point. We have discussed this case under our Argument on the previous two points, and refer to and adopt it here.

In the first three cases compensation benefits had been claimed and had been paid. In the *Moseley* case the Court expressly held:

“* * * Where an employee injured by a third person elects to take compensation, all his rights against the third person pass, as a matter of law, to the state for the benefit of the state compensation fund.”

The Court analyzed the provisions of the statutes of the several states, and the many different provisions thereof, and further said:

“* * * We are of the opinion, both on authority and on a logical interpretation of the language of the statute that, under its provisions, when payment under

the compensation act is chosen by the injured employee, his rights *of every nature* against the third person pass as a matter of law to the state or other insurer, and *no right of action, either direct or indirect, remains in him as against such third person.*

* * *

The Court expressly upheld the constitutionality of the law as against the contention of the plaintiff. The Court pointed out in the *Moseley* case—as happens to be the fact in the case at bar—that the plaintiff had made no effort to have his award set aside in the only manner in which it could lawfully be set aside, that is, under the provisions of Section 56-972, by review by the Supreme Court.

It is pertinent that in the case at bar, in his pleadings, the appellee prayed that the Court set aside his election, but he subsequently abandoned the same and moved to strike that part of the prayer of his complaint (T.R. 161) which motion was granted (T.R. 161).

In the *Moseley* case the Court reserved jurisdiction as to whether, on a proper showing, an apparent election might have been set aside on the ground that it had not been raised by the pleadings. The amended complaint does not raise it here.

In the *Nevelle* case, *supra*, the Commission undertook to recover from the third party an amount in excess of what it had paid, or was obligated to pay, the injured person; and to pay any difference over such amount to the injured workman. The Court, in that case, did not have under direct consideration the right of rescission. However, the effect thereof would be the same. The action of the Commission would enable the workman to collect the bene-

fits to which he was entitled under the compensation law, and have the Commission sue to recover for a larger amount from the third party, and pay any excess recovered to the injured workman.

The Court held that the Commission could only recover the amount it had paid, or is bound to pay in the future, as the result of an award made to the employee, together with its necessary costs in the premises. The injured man had no interest in the action.

The *Kress* case raised the right of rescission after the receipt of benefits under the statute, upon the theory that the plaintiff was a minor unlawfully permitted to work, and forbidden to contract for such employment and therefore not bound by the Act. Clarence L. Wise was sued as a third party under the allegations of the petitioner even though he was a co-employee. The Court rejected all contentions and held that the exclusive remedy of the minor under the facts was under the compensation law and the Superior Court was without jurisdiction.

In the case of *Weaver v. Martori, et al.*, (1949), 69 Ariz. 45; 208 P.(2d) 652, the case involved a minor who, through a guardian ad litem, first filed suit in the Superior Court of Maricopa County, which was removed to the U. S. District Court at Phoenix, and dismissed for lack of jurisdiction upon the allegations of the complaint that the minor was an employee of the defendant. The minor through a guardian ad litem subsequently filed a proceeding before the Industrial Commission of Arizona. The defense was that the proceedings before the Commission were barred by reason of the fact claimant had prosecuted the action in the Federal court to a conclusion; the Court denied the contention and said:

“* * * The Commission suggests that the filing of this suit constituted an election of remedies under Section 56-950, A.C.A. 1939, and that the minor, acting through petitioner, had no right to file the instant claim for compensation. *If we were dealing with the rights of an adult, or of minors who under Section 56-974, A.C.A. 1939 are deemed sui juris, this contention would be sound.* However such a claim cannot be sustained as to this minor because the power of the guardian ad litem then representing him are especially limited in the right of election as stated in 43 C.J.S., Infants, Sec. 111(a): ‘Election for infant. Neither a guardian ad litem nor a next friend may make an election for an infant without the consent of the court; but it may be done with such consent.’”

The Supreme Court of Arizona repeatedly has held that, in the absence of a clear showing of fraud or over-reaching, when an award is made, and payments thereunder are accepted without appeal, that it becomes *res adjudicata* within thirty days after it is rendered. Section 56-972, A.C.A. 1939.

DiPaolo v. Calumet & Arizona Mining Co., 36 Ariz. 374, 285 Pac. 680;

Beutler v. Industrial Commission, 67 Ariz. 72, 190 P.(2d) 918.

And the Court held that the Commission under its rules may not extend the time of appeal, or recover a lost jurisdiction, by an attempt to waive its rules and re-open the case.

Guy F. Atkinson, et al. v. Kinsey, et al., 61 Ariz. 127, 144 P.(2d) 547;

Lauderdale v. Industrial Commission, 60 Ariz. 443, 139 P.(2d) 449.

Attention is drawn to the fact that Section 56-950, *supra*, and Rule 72 of the Industrial Commission, which is, in part, a rescript thereof, provide:

“Acceptance of compensation from the Commission, or other insurance carrier, shall be deemed to be an election to take compensation.”

The statutory rule we contend is a *conclusive presumption*.

The statute and the rules of the Commission are in accord with the general rule on “Election of Remedies” in the State of Arizona.

Calvi v. Dowdy, 14 Ariz. 148, 125 Pac. 873;

Consolidated Arizona Smelting Co. v. Ujack, 15 Ariz. 382, 139 Pac. 465;

Lee Moor Contr. Co. et al. v. Industrial Comm., 65 Ariz. 300, 179 P.(2d) 786;

Bradley v. Industrial Commission, et al., 51 Ariz. 291, 76 P.(2d) 745.

These general rules are not modified by the adoption in Arizona of the Rules of Federal Procedure:

Hartford Accident & Indem. Co. v. Industrial Comm., 66 Ariz. 259, 186 P.(2d) 959.

The general rule is thoroughly briefed in an annotation to 6 *A.L.R. (2)* 11-82, and more particularly, pages 18 and 30 thereof, where the Arizona rule is discussed.

We are not unmindful of the cases of:

Miles v. Lavender (1926), 10 Fed.(2) 450;

Twohy Bros. Co. v. Rogers, 293 Fed. 566;

Johnsen v. American-Hawaiian S.S. Co. (1938), 98 Fed.(2) 847.

These cases were decided by this Court prior to the impact of the rule in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64; 32 L.Ed. 1188, and we deem them to be without application at this time; and for the further reason that they have no application under the particular statute under consideration.

We, furthermore, are not unmindful of

Richardson v. Commissioner of Internal Revenue,
126 Fed.(2) 562, 140 A.L.R. 705, at 713,

in which it was asserted that trial judges in Federal courts are:

“* * * not compelled to play the role of ventriloquist’s dummy to the courts of some particular state
* * *”

We contend, however, that the trial judge is required to give effect to the Arizona law, as interpreted by the decisions of the Arizona Supreme Court. And, that there is no support under the facts, and the law, for attempted invalidation of an election of remedy made under the Arizona statute.

CONCLUSION

We contend, therefore, that the judgment of the trial court should be reversed upon the following grounds:—

- (a) That Sanderson & Porter were not independent contractors;
- (b) That Sanderson & Porter and appellee were, in truth and in fact, and in law, fellow employees and insured by a common employer under the Arizona Workmen’s Compensation laws in the State Compensation Fund;

(c) That no cause of action will lie against a "fellow employee" for an injury by accident arising out of and in course of employment;

(d) That the exclusive remedy of the appellee was under the workmen's compensation law;

(e) That even if Sanderson & Porter were in truth and in fact an independent contractor, appellee had made a valid election of remedy; and his cause of action, if any, against the alleged independent contractor was assigned to the Industrial Commission by operation of law;

(f) That even if a cause of action would lie against a "fellow employee" appellee had made a valid election under the workmen's compensation law and his cause of action, if any, was assigned to the State by operation of law;

(g) That the grounds alleged in the complaint, or matters in evidence, are not sufficient to constitute any equitable grounds upon which the Court might set aside an otherwise valid election of remedies;

(h) That the Court was without jurisdiction to set aside the election of remedy even if good grounds existed therefor, for the reason that the plaintiff, by amendment of his complaint, expressly withdrew this issue from the trial (T.R. 161) *Moseley v. Lily Ice Cream Co.*, supra.

(i) That there is no evidence to support a finding of fact, or a conclusion of law, that the election of remedy was invalid;

(j) That if the award of the Commission was invalid it could only be set aside—after 20 days—by appeal to the Supreme Court of Arizona. And, after 30 days that court is without jurisdiction.

(k) If there were a valid election of remedies, and defendants-appellants were determined to be independent contractors the cause of action was automatically assigned to the Industrial Commission by operation of law, and the Federal Court was without jurisdiction in the premises.

It is the view of intervenors-appellants that the matter of interpreting the contract, and effect of the election, are conclusions of law for the court, and were not issues for the jury, and that no new trial is necessary in the premises.

Therefore, it is respectfully submitted the judgment should be reversed with cost to intervenors-appellants.

Respectfully submitted,

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No. 12,594

IN THE
United States
Court of Appeals

For the Ninth Circuit

P. G. TAYLOR, SEATON PORTER, HENRY W.
BUTLER, R. W. HAMMILL, W. E. HAMILTON,
FRANCIS BLOSSOM, D. J. WALSH, HARRISON
SMITH, P. S. PELLETIER, WYNN MEREDITH, In-
dividually and Doing Business as SANDERSON
& PORTER and SANDERSON & PORTER, a Part-
nership,

(Defendants) Appellants,

vs.

JOHN E. HUBBELL and WILMA HUBBELL,

Appellees.

TUCSON GAS, ELECTRIC LIGHT AND POWER COM-
PANY, a Corporation, and THE INDUSTRIAL
COMMISSION OF ARIZONA, a Public Agency,

(Intervenors) Appellants,

vs.

JOHN E. HUBBELL and WILMA HUBBELL,

Appellees.

Defendants-Appellants' Reply Brief

Upon Appeal from the District Court of the United States
for the District of Arizona.

FILED

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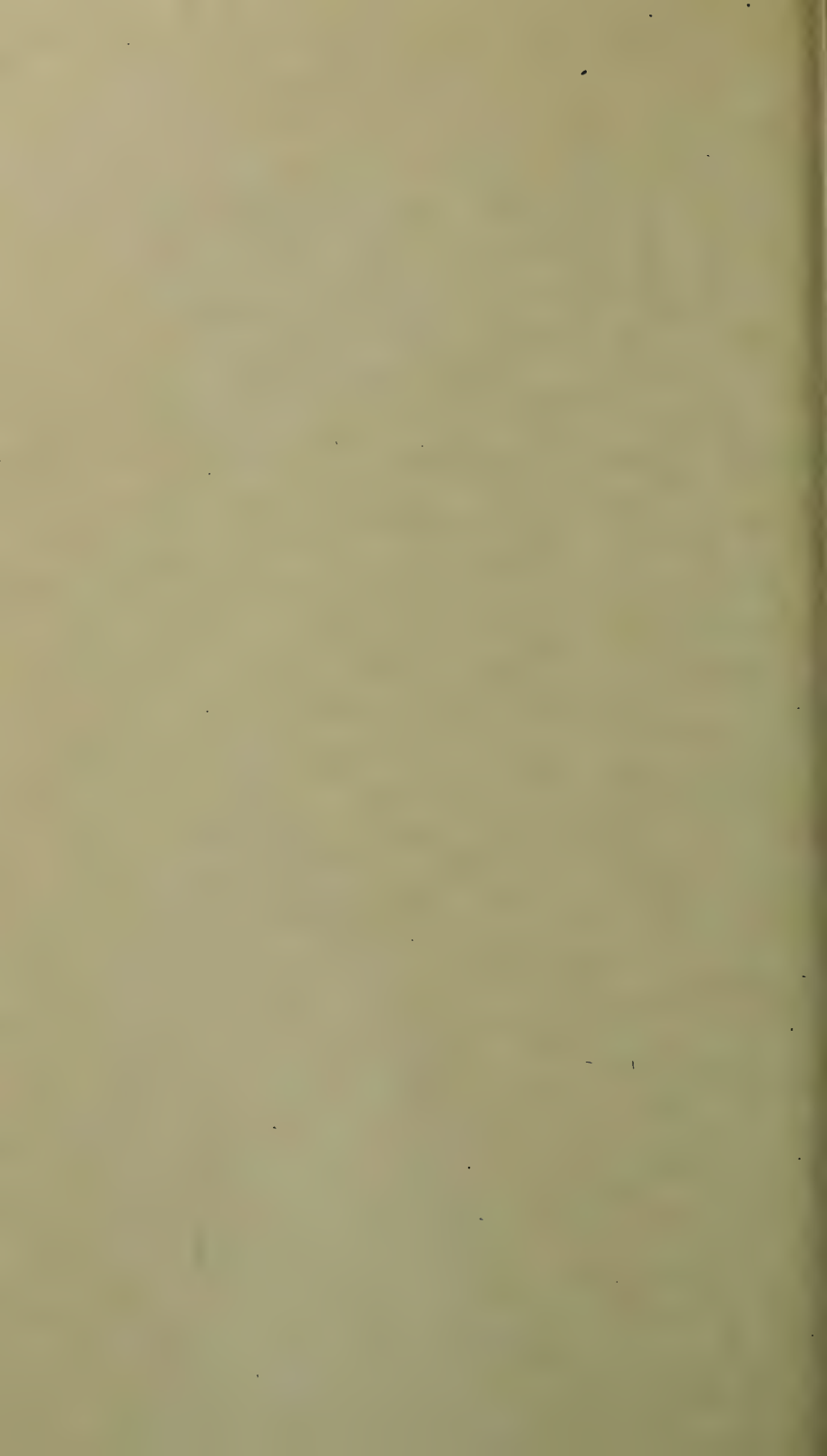
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Defendants-Appellants' Reply Brief

Upon Appeal from the District Court of the United States
for the District of Arizona.

**LIABILITY OF DEFENDANTS-APPELLANTS
AS CO-EMPLOYEES**

At all times since the inception of this case in the Arizona Superior Court the complaint has been founded on the charge of negligence by the defendants-appellants as independent con-

tractors. No effort was made below to amend the complaint to charge, in the alternative or otherwise, liability on the part of the defendants-appellants as co-employees of the appellee, John E. Hubbell.

Now, primary reliance by appellees is placed on that contention.

Appellees' counsel make no effort to enlighten Court or counsel on the duty defendants-appellants as appellee John E. Hubbell's co-employee owed him and merely assume that the issues in an action of that sort are identical with those in this action against them as independent contractors. The relations are so dissimilar that it would seem that appellees should have endeavored to carry the burden in this argument.

The earlier cases were very clear to the effect that an employee's liability to a co-employee or a third person is limited to acts of misfeasance, negligence resulting from mere nonfeasance, being non-actionable. Perhaps the leading case in the country is *Murray v. Usher*, 117 N.Y. 542, 23 N.E. 564.

Also see *N. O. & T. P. Railroad Co. v. Robertson*, 115 Ky. 858, 74 S.W. 1061; 52 A.L.R. 1401 at 1405, 6.

This principle has been applied by the Federal Courts in removal matters—*Knight v. Atl. Coast L. Rd. Co.*, 73 F(2) 76(C5), 99 A.L.R. 405, and by an Arizona District Court (Judge Sames) in *Donaldson v. Tucson Gas E. L. & P. Co.*, 14 F.S. 246.

It is true that some of the later state cases reject distinctions between misfeasance and nonfeasance but there is a line of very respectable authority which still enforces the distinction. 2 *Am. Jur. Agency*, Section 325, Page 255.

There is no decision in Arizona and just what the Arizona Courts will hold is a matter of conjecture. If they apply the rule above mentioned, so very ably stated in all of the above authorities, no one could reasonably contend that the jury found against defendants-appellants, that is, found that these defendants-appellants were guilty of misfeasance toward the appellee, John E. Hubbell.

The complaint alleges both misfeasance and nonfeasance on the part of these defendants-appellants. The charge to the jury made no point of the matter. The Court charged that negligence might be either affirmative or negative, misfeasance or nonfeasance. The jury might have acquitted the defendants-appellants of misfeasance and convicted them of nonfeasance.

Even if this Court should hold that the defendants-appellants were liable to the appellee, John E. Hubbell, if he was injured by any form of negligence, misfeasance or nonfeasance on their part, still they were entitled to have the issue submitted to the jury, it being in any event different from the issues raised by the pleadings.

It is respectfully submitted that these defendants-appellants, who personally had nothing to do with the accident, could be held liable only for some breach of duty they owed to the appellee, John E. Hubbell. Liability by virtue of respondeat superior is out of this feature of the case. *Res. Agency*, Section 358 (1).

Any right on the part of the appellees to hold Robert Gibson, foreman, or Harold Fields, guard, for negligence doesn't impose liability on these defendants-appellants.

Defendants-appellants of course owed said appellee the duty to exercise due care to employ competent and prudent men to carry out the work and protect persons lawfully on the premises from harm. There is no charge of failure in this regard.

Analagous cases would seem to be those bearing on the liability of a supervising agent or employee to co-employees. 13 *Am. Jur.*, Page 1024.

We will now discuss appellees' brief under the headings used by them.

PART I

Section A of Appellees' Brief, The Constitutional Question

(Appellees' Brief, Page 8)

Counsel contend that Section 56-949 violates Article XVIII, Section 6, of the Arizona Constitution. This Court no doubt has the power in this case to declare acts of the Arizona Legislature violative of the Arizona Constitution, but it is submitted that it

is an exercise of power by the Federal Courts that should be sparingly used where a statute, such as this one, has been in the Arizona Code for twenty-five years.

Counsel rely on the case of *Alabama Freight Co. v. Hunt*, 29 Ariz. 419, 242 Pac. 658.

This case holds in effect that the Arizona Constitution guarantees common law rights of action for damages and that the Legislature may not destroy them. These common law rights are said to be constitutionally approved. The Court, nevertheless, holds that a legislative act which forces one to an election either to retain such common law rights of action or accept the benefits of a Workmen's Compensation Act does not infringe his constitutional rights and that such act is consequently within the power of the Legislature.

An act of that sort doesn't destroy any rights. Those rights are fully preserved. It merely offers the claimant the option of substituting therefor another remedy. If the opportunity of choice is reasonable and fair and the claimant under no compulsion to choose the alternative remedy, his voluntary course of action is not disturbed and he has no ground for complaint.

The contention of appellees that the election offered by the Legislature must be a choice of remedies against the same tortfeasor—in this case co-employees—finds no basis in reason. We are here dealing with Workmen's Compensation laws, behind which is the policy of the State that industry pay for the injuries of its employees. The employee has his common law cause of action against a co-employee. He may retain it if he wishes. The act puts him to a reasonable election between the assertion of such cause of action or a claim to compensation benefits under the Workmen's Compensation law. It is not material as a practical matter or on principle that his elective right is against the industry rather than against the employee.

We see no point in discussing the case of *McClellan v. Auto Insurance Co.*, 80 F.(2) 344, (C.C.A. 9), as it bears on this

matter only because of its quotation from the Alabams case. The factual situations are entirely different.

We think *Moseley v. Lily Ice Cream Company*, 38 Ariz. 417, 300 Pac. 958, is in point. The constitutionality of Section 56-949 was challenged on the same basis as the challenge in this case. The Court denied this contention because, as it held, the claimant was given a reasonable election either to hold the third party at common law or to hold the employer under the Act.

Kress & Company v. Superior Court, *infra*, sustains view that the section in question is valid. See discussion *infra*.

Appellees' counsel get some comfort from the New York case, *Judson v. Fielding*, 237 N.Y.S. 348, but we fail to see where it is applicable to this point. See later discussion of this case.

Section B. Interpretation of Words "In the Same Employ" (Appellees' Brief, Page 20)

It is next contended that the failure of the employee to reject the Act (thus bringing him under the terms thereof) does not affect his right of action to damages against his co-employee. The effect of appellees' arguments is that the injured co-employee may accept the benefits of the Workmen's Compensation law and also hold his fellow employee in damages, and that he is not put to an election until after his injury.

But such an argument, it seems to us, defeats itself. If the employee, concededly bound by the Workmen's Compensation Act, nevertheless retains the right to sue his co-employee for negligence, to what purpose then does the statute force him to election at the very moment of the enjoyment of his dual rights?

The more reasonable interpretation of these statutes is, we submit, that the Constitution and the Legislature intended to create a right to compensation which, if accepted by the employee, was in lieu of any causes of action that he might have either against his employer or against "any of his or its agents, or employee or employees." Article XVIII, Section 8.

Strangely enough, there is no decision in Arizona which discusses this specific point but it was raised on the record in the

case of *Kress & Company v. Superior Court*, 66 Ariz. 67, 182 Pac. 931.

In that case the employee by his guardian brought an action at law against his employer and co-employee, Clarence L. Wise, assistant manager of the employer. The defendants, both of them, filed in the Supreme Court of Arizona an original proceeding for a writ of prohibition on the ground that the plaintiff was an employee covered by the compensation policy of the defendant company and consequently had elected to take the benefits of the compensation act and was, therefore, in no position to bring an action at law against either defendant. This position was sustained by the Supreme Court as to both defendants.

True enough, there is no discussion in the case of the right of the plaintiff to sue his co-employee but it is scarcely to be believed that the Arizona Supreme Court on an original hearing of that kind, involving a question of such great importance to the people of Arizona, would overlook the fact that one of the defendants was a co-employee of the plaintiff. If the appellees are correct in this case the Court would have been compelled to deny the writ of prohibition in so far as the co-employee, Wise, was concerned, although granting it as to the employer.

We submit that under the doctrine of *Erie R. Co. v. Tompkins*, 302 U.S. 671, 82 L.Ed. 1188, 114 A.L.R. 1487, this Court should consider that the law is established in Arizona that an employee covered by his employer's compensation policy cannot sue a co-employee for negligence.

The trial judge was from another jurisdiction and certainly in no position to establish an abstract rule of law for Arizona—as a matter of fact, less so than the Industrial Commission, with its quasi judicial power to hear and act, under constant exercise. (And that the Commission was and is acting honestly and conscientiously in the belief and holding that appellees have no claim against defendants-appellants and should have remained and now be placed on the compensation payrolls of the Commission, we do not believe any fair minded person will challenge—whatever may be in the minds of appellees' counsel. (Appellees' Brief 73).)

Appellees' counsel cite cases from other jurisdictions. We believe they throw little light on the subject, so considerable are the differences in constitutional and statutory provisions, apparently under frequent amendment. The New York case of *Judson v. Fielding*, 277 App. Div. 430, 237 N.Y.S. 348, affirmed in a memo opinion in 253 N.Y. 596, 171 N.E. 798, is most heavily relied on.

While the New York statute at the time the *Judson* case arose was quite similar to our 56-949, it may not be disembodied from the statutory structure of New York, consisting of its constitution and laws, and considered in the abstract, nor is it possible thoroughly to appreciate its force without careful study of the earlier controlling New York decisions—a task unduly burdensome.

We do know, however, that it apparently was unfavorably received in New York as the Legislature shortly thereafter amended the law to prevent one employee from suing his fellow employee. This is revealed by the following quotation:

"The legislative history of subdivision 6 shows it has no application to an action brought by an injured employee, or, in case of death, by his dependents, against a third party. That subdivision in its present language, but without separate numbering, became part of the Workmen's Compensation Law by an amendment to Section 29, L. 1934, ch. 695. It was enacted following the decision in *Judson v. Fielding*, 277 App. Div. 430, 435, 237 N.Y.S. 348, 354, 355, affirmed 253 N.Y. 596, 171 N.E. 798. In that case, construing the statute as it read prior to its amendment in 1934, the court said: 'We find no intent or purpose in the statute to absolve any but the employer from liability in a civil action for damages caused by his own wrong.' Therefore, the court held the statute did not bar one co-employee from suing another for damages resulting from a negligent act occurring in the course of their common employment.

"Assuming, as we may, that the lawmakers were cognizant of the statute as it then existed and the construction of it by the courts, it is clear that in enacting subdivision 6, the Legislature intended to abrogate the rule announced in the *Judson* case." (Cases cited.) *Caulfield v. Elmhurst Contracting Co.*, 268 App. Div. 261, 53 N.Y.S. (2) 25.

It might perhaps be appropriately said that if the Judson case should carry weight because of similarity of New York statutes to our own, so also should cases from Oklahoma and Oregon, grouped by our Supreme Court with New York cases. Cases from these three jurisdictions are also grouped for discussion in 71 C.J. 1530. It will be noted that the rule in Oklahoma and Oregon is disclosed to be contrary to that of the Judson case. Also in note 79, page 1531, the author appears to conclude there is some contrariety of view in New York on the question.

The text is:

"Under a provision permitting, under certain circumstances, an injured employee to bring an action against another not in the same employ, such an action may be maintained when, and only when, such other is not in the same employ, but there is authority for the view that such a provision does not prevent an action at law against a co-employee."

The cases cited in support of the affirmative statement are from Oregon and Oklahoma, while those cited for the final qualifying clause are from New York.

Statutes preserving rights against "third persons" (Missouri-applied in 94 F.(2) 132), "third parties" (Wisconsin), "person other than the employer" (California, North Carolina, Connecticut and Louisiana), (see cases cited by appellees, pages 22, 59, 25) are not as sweeping as those of Arizona, Oklahoma and Oregon where the language is "not in the same employ." If defendants-appellants were co-employees of appellee, John E. Hubbell, they would appear to be in the same employ.

Section C. The Independent Contractor Question—Generally (Appellees' Brief, Page 26)

The appellees in their complaint allege that defendants-appellants were independent contractors and it would appear that the burden of proof is on them to establish that allegation. It is true that the word "agent" has a wide connotation but it doesn't seem to be particularly helpful to engage in an abstract discus-

sion of its meaning. Our Arizona statutes and court decisions have, we think, defined as clearly as is usually found, the distinction between an independent contractor and an employee. No one argues that because an independent contractorship has some of the elements of an agency relation, an independent contractor, is not within the scope of the phrase "not in the same employ," in Section 56-949. The terminology used in our opening brief appears to meet appellees' views.

Section D. Independent Contractor—Right of Control

(Appellees' Brief, Page 32)

We do not quarrel with the proposition of law that the right of control over the means and methods of doing the work is determinative of the question of independent contractorship nor with the reasoning and conclusion of this Court in *Hearst Publications v. N. L. R. B.*, 136 F.(2) 608, (reversed for reasons not important here in *N. L. R. B. v. Hearst Publications*, 322 U.S. 111, 88 L.Ed. 1170, 64 S.C. 851) nor with the abstract correctness or Restatement of Agency, Section 220. (Although it doesn't establish any satisfactory rule of thumb for all cases in the view of the Supreme Court in the case cited above—note 19—and recognizes the limitations of Workmen's Compensation laws, Sections 491 and 528.)

Section E. Determination of Agency Question, Functions of Court and Jury

(Appellees' Brief, Page 34)

We agree that the rules laid down in 56 C.J.S. 92 (Master and Servant, Section 13) in these words:

"As in civil actions generally, where the evidence on a material issue in actions involving the relation of master and servant is conflicting or admits of more than one inference, the question thereby raised is one of fact for the determination of the jury; otherwise the question is one of law for the court."

are sound. Our views on this matter are set forth in our opening brief, pages 25 to 27 and on page 35.

FRAUD

(Appellees' Brief, Page 36)

The argument apparently is that while the contract ("cleverly and adroitly drawn," page 38) probably precludes a relationship of employer-independent contractor and commits the parties to an employer-employee relationship, defendants-appellants ought not to be allowed to rely on that effect of the contract because "yet it must be apparent that this contract was drawn in anticipation of just such a contingency as gave rise to this law suit." This is followed by the rather inflammatory remark "Such a contract gives Sanderson & Porter liberty to go about the nation contracting huge construction jobs, and injuring such workers as this plaintiff with impunity."

It is a gratuitous and baseless charge (repeated elsewhere in this brief, instances being on pages 43, 44). Appellees' counsel are hard put to it when they ask this Court to impute to defendants-appellants the mean and contemptible purpose of preventing employees of the latter company from recovering against the former.

Cases may be found where an obvious effort was made to prevent an employee from having from his employer the benefits of the Workmen's Compensation Law, as when a pretense is verbally made that a relation of employer-independent contractor is created, it being obvious, however, that the so-called independent contractor is a mere servant.

See *Industrial Commission v. Weddock*, 65 Ariz. 324, 180 Pac. (2) 580.

(But see *S. W. Mills v. Ind. Com.*, 60 Ariz. 199, 134 Pac. (2) 162, where such a relation was sustained against the charge of fraud with unhappy result to injured employee.) That is the statement in 56 C.J.S., Page 48, which appellees quote on page 37 of their brief.

But no case or authority can be cited which holds that parties such as are before this Court are powerless to make a contract whereby the relationship of employer-employee is voluntarily assumed.

It is obvious from the contract the parties thereto did create a relation of employer-employee. This was done with no evil purpose in mind—toward men employed by Tucson Company, or anyone else, but in the exercise of their right as free men to assume such relationship toward that company, as they and it deemed satisfactory.

Not only do appellees charge us with fraud—they find us guilty, too. That “issue” also, we assume they consider, was not for the jury.

Section F. The Contract Construed

(Appellees' Brief, Page 38)

Several provisions of the contract are picked out as inconsistent with an employee relationship but they are no more than a statement of the services to be rendered. The provision that the project will be turned over to the employer is not inconsistent with the full right of supervision granted at the outset of the contract.

Section G. The Contract—Right of Termination

(Appellees' Brief, Page 41)

Argument is made that this right is trivial and un compelling because (a) the contract was not terminated and (b) the Tucson Company did not have the men or know how to complete the job.

As to (a): It is the right to terminate that is relevant;

As to (b): One's inability to complete a contract in the future would not appear to be relevant on the question of the immediate relationship.

And the assumption of facts—inability to complete—is not supported by the record. No reason appears why the Tucson Company could not have installed these generators. See testimony of Mr. Saunders at 133, Mr. Snider at 130 and Mr. Lovell at 117.

Section H. The Contract—Similar Instruments Construed

(Appellees' Brief, Page 44)

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the Arizona statutes and decisions a conclusion should be reached. It but confuses to consider the innumerable authorities on the subject.

On page 48 counsel say of *Southwest Lumber Mills v. Industrial Commission*, 60 Ariz. 199, 134 Pac. (2) 162:

"The contract gave the company broad powers over the contractor. It could terminate the contract immediately without notice; the contract could not be assigned, etc."

Compare this with the quotation from this case on pages 23 and 24 of our opening brief.

We will not review their discussion of the cases cited by appellants but would like to call the Court's attention to the following languages from *Industrial Commission v. Weddock*, 65 Ariz. 324, 180 Pac. (2) 580:

"We cannot conceive of an independent contractor subject to being summarily, or within a period of twenty-four hours, dismissed without liability as the contract states, and yet not be under the order and control of another party."

The point is suggested on page 50 of appellees' brief that the installation of these generators on the Company's own property and as a part of its going system was no part of its trade or business. This would mean that a utility must let an independent contract for the installation of new facilities whether it cares to do so or not. It would appear clear that the construction of a plant the employer intends to operate is a part or process in its business or trade within the meaning of Section 56-928. Attention is called to the express inclusion in the Articles of the Tucson Company of the right to erect its own plant, etc.—if, indeed, express authority was necessary. (Tr. 188.) And we might in passing note that Mr. Hubbell's work for the Company was the stringing of wires on a new line of poles the Company had placed for the purpose of connecting up with the new plant.

Section I. The Restatement and Surrounding Circumstances

(Appellees' Brief, Page 52)

While we believe the Arizona statutes and cases furnish enough law for a decision in this case, and consequently Restatement Section 220 cannot be considered as controlling, (see also our comment *supra* under Section D), nevertheless, the principles laid down appear to be no more than a codification of the law as generally applied by the courts in diverse situations.

The nine criteria are not like a nine-round prize fight where the winner of a majority of the rounds on points takes the money. The effort to divide the test into nine compartments is praiseworthy and helpful but affords no final formula. If in answer to criterion i it is determined that the control is so great an employer-employee relationship was created, all the rest fade into insignificance.

This point i is discussed most thoroughly in other parts of appellees' brief and our own and we believe that any further discussion of ii, iii, iv (all related) would also be repetition. V was answered specifically by Mr Broockmann who testified "Sanderson & Porter did not bring any tools or equipment for this job" (138, last line). The so-called office building was on the Tucson Company's property and belonged to it. Under vi the point is made that Sanderson & Porter carried their own compensation insurance and Mr. Broockmann explained why (140). Vii concerns the method of payment which in this case is in no wise inconsistent with the employer-employee relation. Viii is the point elsewhere discussed—whether the work was part of the trade or business of Tucson Company.

As to ix:

"Whether or not the parties believe they are creating the relationship of master and servant."

This is new. There was considerable evidence on this score. All, we submit, to the effect that the parties did not intend to create an employer-independent contractor relationship. To the contrary, the intention was definite and, we submit, undisputed,

that there should be the relation of employer-employee. See testimony of Saunders, president of local company (129-130), and Broockmann, representative of defendants-appellants, (137).

**Section J. Substantial Agreement of All Witnesses
as to Facts of Relationship**

(Appellees' Brief, Page 63)

Our position, which counsel profess to find confusing, is that the contract in this case necessarily governs unless the appellees were able to show that it was conceived in fraud or that in actual practice was so far abandoned as to create a relation of employer-independent contractor. We do not believe they succeeded sufficiently to carry the case to the jury, but in any event they surely did not succeed to the point where the lower court was justified in removing the issue from the jury's consideration on the theory that there was no substantial evidence to sustain defendants-appellants' position.

One very serious issue of fact would be whether the parties acted in good faith in drafting the contract in the terms employed or whether there was an intention to hide the real relationship of the parties thereto. This would invoke determination of the actual intention of the parties when the contract was signed as to the true relationship to be created. There would also be the issue whether there was any intention in the performance of the work to convert the relationship from employee to independent contractor. These would be issues of fact for submission to the jury—not the numerous details set up by counsel on pages 64 and 65, all matters of evidence, important only as they might bear on the issues. And these issues involve intention, a matter peculiarly within the jury's province.

Section K. Summation—The Independent Contractor Question

(Appellees' Brief, Page 67)

There is nothing new here except the suggestion that if Sanderson & Porter can become employees, so also may United States Steel and General Motors. No doubt they frequently do if, as

we presume is not improbable, they undertake to make installations for clients who insist on complete supervision and control. Surely many corporations do act in that capacity. Any holding that all corporations, willy nilly, are independent contractors would leave their employees without compensation protection, if, as too often happens, they are not insured under the Act and not able (or successfully unwilling) to take care of an injured employee. We might add that Sanderson & Porter is a partnership of individuals.

PART II

Section A. The Election Question

(Appellees' Brief, Page 69)

We do not comprehend the argument on pages 79 and 80—although it may be our density. We confess we did not and do not believe that 56-949 and 56-950 are totally inconsistent. See also appellees' brief, page 17.

Undeniably the case of *Johnsen v. American Haw. S. S. Co.*, 98 F.(2) 847, has points of resemblance to our case. It, nevertheless, did not involve an Arizona statute or Arizona law and the rule of the decision (if not influenced by the fraud element) would, we believe, in effect overrule the principle so clearly recognized in *Weaver v. Martori*, 69 Ariz. 45, 208 Pac. (2) 652, and be a disturbing influence in the administration of our compensation law.

It is not likely our Courts will depart from the view that an injured employee, by bringing his action against a third party, makes a binding election whether he knew he was by statute put to a choice or not; nor, confirming that holding, at the same time accept the view of this Court, if so be the decision, that an employee may take compensation indefinitely as long as he does not know the law requires him to make a choice, repudiate his earlier choice when he does learn the legal situation and sue the third party for damages. As between the two situations, the equities would appear to be greater in favor of the former, who will lose all if he fails in his common law action. The employee

who accepts compensation and then changes his position has nothing to lose for if he fails to prevail against the third party or his recovery is inadequate, he may then return to the Commission compensation rolls for the difference between full compensation benefits and his recovery on his negligence action, 56-949—a position the appellees in this case enjoy.

How may the Arizona Courts accept the doctrine that the right to sue a third party cannot be lost by the employee's acceptance of compensation from his employer, no matter how long, until he learns the law requires him to make a choice between the two remedies, and at the same time enforce the inflexible Arizona rule, in effect ever since *Consolidated Arizona Co. v. Ujak*, 15 Ariz. 382, 139 Pac. 465, that an employee's election to accept compensation or his institution of a suit is absolutely final and binding so far as his employer is concerned? Nothing short of an equitable ground of relief is sufficient to justify the employee in changing his remedy against his employer. See cases cited on page 31 of our opening brief.

If we understand the principle of *Erie Rd. Co. v. Tomkins*, supra, correctly, this Court should apply to this case the rule it believes would be applied by the Arizona Courts, if the matter were before them. Whether that rule seems harsh (although in this case it clearly cannot work any hardship on the appellees, since the benefits under the Arizona Compensation Law are liberal and may in the end be more beneficial to appellees than a lump sum of fifty thousand dollars, less expenses, the lien of the Commission and, we believe it not unfair to add, attorneys' fees) or less equitable or reasonable than the rule of the Johnsen case is beside the point—although much may be said in defense of the Arizona rule, and some federal courts differed from this Court's holding in the Johnsen case.

We had thought appellees' counsel were relying on the dicta in *Moseley v. Lily Ice Cream Company*, 38 Ariz. 417, 300 Pac. 958, in support of their contentions in this connection (see our opening brief, pages 32 to 34) but apparently they accord it little weight. See pages 70 and 71 of appellees' brief. Needless to say, we agree that it has no controlling force.

Section B. The Jury Question**(Appellees' Brief, Page 82)**

Even if the principle of the Johnsen case is applied here, the acceptance by appellee of compensation benefits would prevent this action if he then knew he was compelled to make a choice of remedies.

This was an issue of fact raised by the pleadings and the burden of proof was on appellees to show his ignorance of the law.

The question was the state of appellee's mind. Disproof of his sworn testimony may be—nearly always is—difficult.

On the evidence before it, the jury could reasonably have found that appellee was mistaken or not telling the truth. His credibility was definitely to be determined.

Without trying to exhaust the record, a reasonable argument could have been made to the jurors that applying their experience as people of the community Mr. Hubbell, a man of considerable intelligence, once a foreman on a railroad with ten men at times under him, for some time in the employ of a business of hazardous nature, must have realized in the long period after drugs were discontinued, when he was signing compensation claims, conversing with others, considering his rights against Sanderson & Porter and to compensation, that he was bound to make a choice between remedies. Once it was the law that all persons were presumed to know the law. If that is now in the discard, have we gone to the other extreme—is it now the law that one's sworn, uncorroborated (with corroboration at hand) statement that he did not know the law must be accepted in the absence of directly contradicting evidence? Is it not sufficiently probable that Mr. Hubbell was advised of a law on our Arizona statutes for many years—a law which certainly ought to be universally known among those primarily benefited thereby—to carry the case to the jury?

There are cases holding that the unimpeached testimony of disinterested witnesses may not be disregarded, (a rule that

ought to be applied with extreme caution) and some courts would extend the principle to parties themselves; but the general rule for the Federal Courts would appear to be that stated in *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U.S. 401, 43 L.Ed. 492, 19 S.Ct. 233, that the mere fact that the witness is interested in the result of the suit is sufficient to require the credibility of his testimony on any issue of fact to be submitted to the jury although his testimony is uncontradicted.

See discussion and review of cases in *Sartor v. Arkansas Gas Co.*, 321 U.S. 620, 88 L.Ed. 967, 64 Sup. Ct. 77.

The Arizona rule was stated in terms equally as sweeping as those used by the United States Supreme Court in *Davis v. Ind. Com.*, 46 Ariz. 169, 49 Pac. (2) 394.

No doubt there are a few exceptions to this general rule but it is submitted this case does not fall within them, concerning as it does a question of mental processes.

CONCLUSION

It is respectfully submitted that the judgment should be reversed and judgment ordered that appellee, John E. Hubbell, be restored to the compensation payrolls of the intervenors, The Industrial Commission of Arizona, or that a new trial be granted.

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Appellants.*

No. 12,594

IN THE

United States Court of Appeals
For the Ninth Circuit

TUCSON GAS, ELECTRIC LIGHT AND POWER
COMPANY, a Corporation,

and

THE INDUSTRIAL COMMISSION OF ARIZONA,
a Public Agency,

Intervenors-Appellants,

VS.

JOHN E. HUBBELL and WILMA HUBBELL,

Appellees.

Appeal from the United States District Court,
District of Arizona.

INTERVENORS-APPELLANTS' REPLY BRIEF.

H. S. McCLUSKEY,

Arizona State Building, 1640 West Adams Street, Phoenix, Arizona,

Attorney for Intervenors-Appellants.

ROBERT E. YOUNT,
Of Counsel.

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No. 12,594

IN THE
United States Court of Appeals
For the Ninth Circuit

TUCSON GAS, ELECTRIC LIGHT AND POWER
COMPANY, a Corporation,

and

THE INDUSTRIAL COMMISSION OF ARIZONA,
a Public Agency,

Intervenors-Appellants,

vs.

JOHN E. HUBBELL and WILMA HUBBELL,

Appellees.

Appeal from the United States District Court,
District of Arizona.

INTERVENORS-APPELLANTS' REPLY BRIEF.

INTRODUCTION.

We have examined appellee's brief and find that it departs from the rule in failing to apply the argument to the several propositions of law tendered in the opening brief.

And, in his brief, appellee fails to discuss several of appellants' propositions, among which are the contention that the Commission had made an award;

and, that the only way the award could be set aside was by a timely action in certiorari to the Supreme Court of Arizona, of which appellee failed to avail himself. The award became *res judicata*. (See Opening Brief of Intervenors-Appellants, page 31).

We shall, therefore, respond to appellee's brief in the manner in which he presented the argument of his case.

Under the heading:

GENERAL SUMMARY

we note that he affirms the statement we made on page 24 of our opening brief, that it is impossible to determine from the record upon what grounds the court predicated its conclusions of law. All we do know is that the only issues the Court submitted to the jury were the questions of negligence, contributory negligence, and the amount of damages.

FELLOW SERVANT ISSUE AND CONSTITUTIONAL QUESTION.

On page 7 of his brief appellee tenders the issue:

“Under the Arizona Constitution and workmen's compensation statutes, an injured employee may sue a fellow servant for negligence even though their common employer is covered by workmen's compensation insurance.”

And he raises a Constitutional Issue. This contention was presented for the first time—so far as our recollection, and a search of the record discloses—at pages 2 and 3 of his brief, entitled:

“Plaintiff’s Memorandum of Authorities in Reply to Defendants’ and Intervenor’s Motion for Judgment *Non Obstante Veredicto*, and Defendants’ Motion for New Trial”,

filed on April 26, 1950.

In his pleadings appellee proceeded on the theory that Sanderson & Porter were “*independent contractors*”; and it was upon that basis that he claimed a cause of action. Our recollection is that at no time during the course of the trial was it suggested that it was immaterial whether Sanderson & Porter were independent contractors, and that a cause of action would lie against them even if they were not independent contractors but fellow employees engaged in furthering a common enterprise.

It was not until after the verdict that appellee advanced the theory that he had a right to sue a “*co-employee*”; and that if the statute prohibited suit against a fellow employee the statute was unconstitutional.

Appellee may not have his cake and eat it, also. He may not plead, and claim, rights granted under the workmen’s compensation law in one breath; and, in the next, claim (as he argues on page 8) that the statute, under which he is attempting to claim benefits, is unconstitutional as a denial of “*due process*”, or in violation of the *Constitution of the United States*; Amendment No. XIV.

Ison v. Western Vegetable Distributors, 48 Ariz. 104, 59 P. (2d) 649, citing in support thereof *Tovrea*

Packing Co. v. Live Stock Sanitary Board, 44 Ariz. 151, 34 P. (2d) 420; *Booth Fisheries Co. v. Industrial Commission*, 271 U.S. 208, 46 Sup. Ct. 491, 70 L. Ed. 908; *Daniels v. Tearney*, 102 U.S. 415, 26 L. Ed. 187; *Grand Rapids & I. R. Co. v. Osborn*, 193 U.S. 17, 24 Sup. Ct. 310, 48 L. Ed. 598; and recently reaffirmed in *Shaw v. Salt River Valley Water Users*, 69 Ariz. 309, 213 P. (2d) 378; *Leva v. Utah Fuel Co.*, 58 Utah 388, 199 Pac. 659; *Orloff v. Los Angeles Turf Club*, 208 Pac. 987.

THEORIES OF LAW.

Aside from the asserted question of unconstitutionality which, as we have urged, cannot be raised, appellee's argument is a clear illustration of what the Supreme Court of Arizona has referred to as an example that "old ideas die hard".

In order to appraise the issue tendered we first look to the intent of the people of Arizona in amending the *Constitution* (Art. XVIII, Art. 9; Chap. 56, *Arizona Code Annotated*, 1939, Amended, Sec. 8) and of the legislature in adopting the statute. (See Appendix I for provisions of the Constitution, in part).

Section 99, Chapter 83, *Session Laws of Arizona* (1925) which exempted the statute from the referendum provisions of the *Constitution of Arizona*, expressed the intent (as shown in Appendix II hereof).

Sections 56-928 and 56-929, *A.C.A.* 1939, (quoted in our opening brief), define who is, and who is not,

an employer and employee under the statute. In construing the words in the compensation law the definition of the word "person" in Section 1-103 of the general construction law obtains, unless the context of the statute indicates contrary. Sec. 56-929 (a) includes:

"* * * 2. *every person* in the service of any employer * * *." (Immaterial parts omitted).

Section 1-103, 3, A.C.A. 1939, defines the word "person" as including: "a corporation, company, partnership or association or society, as well as a natural person."

That the workmen's compensation law is intended to include all such "persons" is clearly established by *Grabe v. Industrial Commission*, 38 Ariz. 322, 299 Pac. 1031; *Industrial Commission v. Navajo County*, 167 P. (2d) 113, 64 Ariz. 172; *S. H. Kress & Co. and Clarence L. Wise v. Superior Court, Maricopa County*, 66 Ariz. 67, 182 P. (2d) 931.

Under the Arizona workmen's compensation law, according to the provisions of Art. XVIII, Sec. 8, *Constitution of Arizona*, as amended; and Sec. 56-944 and 56-945, A.C.A., 1939, every employee is afforded a right of election prior to injury, whether to be bound by the compensation law or to preserve any other remedy which might be available to him. If the employee fails to elect to reject the compensation law before injury, under Sec. 56-944 and 56-945, *supra*, the workmen's compensation law becomes his exclusive remedy against the employer (and, in ef-

fect, against co-employees) except as provided by Sec. 56-944 and Sec. 56-945, *supra* (where the injury is wilfully inflicted by the employer). *Alabam Freight Co. v. Hunt*, 29 Ariz. 419, 242 Pac. 658. And this applies even in the case of a minor unlawfully permitted to work and who might otherwise disaffirm his contract. *S. H. Kress & Co. v. Superior Court, Maricopa County*, *supra*. There is only one other qualification, that is under Sec. 56-949. This Section confers no affirmative right of election on an employee who has elected not to reject the provisions of the workmen's compensation law in the manner provided by Secs. 56-944, 56-945 and 56-946 against a co-employee. The right of election, under Sec. 56-949, is limited to the right to prosecute an action against a third party NOT in the same employ. We think the clear implication always given the statute is that it withdraws entirely the subject of fellow servant liability for all purposes *to avoid litigation, friction and hatred in industry*.

The maxim: "*Expressio unius est exclusio alterius*" is applicable.

Further, Sec. 56-949, *supra*, does not purport to confer upon an employee the right to collect from the employer, or his insurance carrier, "the deficiency between the amount actually collected and the compensation provided, or estimated therein for such case" when a co-employee is involved.

If the Section be construed, as contended for by the appellee, and an employee has a right to sue a

co-employee, then (under that interpretation) he would have no right to any claim against the employer, or his insurance carrier, for any compensation benefits for the reason that the election is limited to "a person NOT in the same employ."

If appellee's argument be valid that he had an unquestioned right of election after injury against the co-employee, and he elected to take compensation, it would follow that his cause of action against the co-employee would be assigned to the employer, or his insurance carrier, as a matter of law. We would then have the spectacle of the employer, or his insurance carrier, having the right to sue the co-employee to recover the losses the employer, and the insurance carrier, would be bound to pay under the compensation law.

We can conceive of no result that would do more to *promote and engender hatred and distrust between employee and employer.*

Under the Constitution the fellow-servant rule as a defense, so far as it affects the liability of a master for injuries to his servant resulting from the acts or omissions of a fellow servant, or common master, is forever abrogated; and the defense of contributory negligence, or assumption of risk, shall in all cases whatsoever, be a question of fact, and shall at all times be left to the jury. *Constitution of Arizona*, Art. XVIII, Sec. 4 (Fellow Servant) and Sec. 5 (Contributory Negligence). Appellee's thesis would, in effect, reinstate the fellow servant rule in part.

We refer the Court to the Arizona employers' liability cases: *Ariz. Copper Co. v. Hammer*, 250 U.S. 400, 63 L. Ed. 1058, 30 S.C. 558; *Robles v. Preciado*, 52 Ariz. 113, 79 P. (2d) 504, for the legislative history prior to adoption of the Arizona workmen's compensation law. For construction of legislative intent after amendment of the Constitution see *Ocean Acc. & Guar. Corp. v. Industrial Commission*, 32 Ariz. 275, 257 Pac. 644; *Robles v. Preciado*, *supra*.

In *Ariz.-Hercules Copper Co. v. Crenshaw*, 21 Ariz. 15, 184 Pac. 996, as early as the year 1919, the Court, in a unanimous opinion, per Baker, expressed the thinking of the Court and of the people of this state. The case involved the matter of construction of the phrase "independent contractor", and is cited as one of the cases under *Definition 220, Agency, Re-Statement of the Law, Arizona Supplement*. The defense of the company was that Manuel Segura, employed by Henry Nolte, an alleged independent contractor, was hired to sink a mining shaft at the rate of \$35 per foot. The reasoning in the case is particularly apt.

In *Corral v. Ocean Acc. & Guar. Corp.*, 42 Ariz. 213, 23 P. (2d) 934, the late Justice Ross, probably one of our most cogent writers, said (at page 217):

"The purpose of the compensation act, as has been repeatedly stated, is, as much as possible, *to dispense with turmoil, contention, and litigation between employer and employee*, and to place upon business the burden of caring for employees injured, or, when killed, their dependents. *Our compensation law is replete with this thought.*" (Emphasis supplied.)

The contention made by appellee in re the case of *Judson v. Fielding* that the compensation law did not amend the common law rights, does not hold good here. The workmen's compensation law regulates the status of employer and employee in Arizona. *Ocean Acc. & Guar. Corp. v. Industrial Commission*, supra, *Robles v. Preciado*, supra.

Appellee's contention that the provisions of the statute doing away with a cause of action against a co-employee are unconstitutional has been answered to the contrary. *Northern Pac. Ry. Co. v. Meece* (1916), 239 U.S. 614, 60 L. Ed. 467; *Mathison v. Minn. St. Ry. Co.* (1914), 126 Minn. 286; *S. H. Kress & Co. v. Superior Court, Maricopa Co.*, supra.

In any event, any contention appellee might have to assert such a remedy is foreclosed by the authorities aforementioned.

FELLOW EMPLOYEE.

At page 28 of our opening brief we cited *S. H. Kress & Co.* and *C. L. Wise v. Superior Court*, supra, as the "case most nearly in point" on this issue. The case was defended by the Industrial Commission on the same premises as we appear as a party in this case. Under the terms of our policy of insurance, issued pursuant to Sec. 56-921, A.C.A. 1939, the Commission insures the entire underlying liability of the employer to his employees, including the cost of an action. The Gas Company in this case asserts that defendants and appellee are its employees. We include

in the Appendix a quotation from our brief in the *Kress* case—our argument as it related to defendant Wise. (Appendix III.)

In our opening brief we limited our language to the “case most nearly in point” for the reason that in the decision granting the writ of prohibition in that case—which, of course, applied to both defendants—the Court did not discuss the application of the law as it related to Wise. However, it did order the dismissal of the complaint as to Wise as well as to Kress Company.

The facts here are similar to those in *Gray v. Hammond Lumber Co.*, 113 Ore. 570, 232 Pac. 637, 233 Pac. 561, 234 Pac. 261, which we shall discuss hereafter.

On pages 72 and 73 of the appellee’s brief he makes further reference to this matter and intimates that the intervenors-appellants have changed their theory of the case. The contrary is true. The matter quoted from the Abstract (page 72), on its face, shows that what intervenors-appellants were then referring to was “rescission after election”, and that we were not then discussing the “right of the appellee to sue a co-employee.”

The question of the application of the *Kress* case to the matter of the liability of a co-employee was not in the mind of the writer in connection with the subject then under consideration. Therefore, the argument and authorities cited on inviting error are not apposite.

On page 73 of appellee's brief he states:

"* * * counsel have been nonplussed to understand why the Commission has fought so tenaciously to prevent the Plaintiff from relieving it of a \$50,000.00 compensation load * * *."

The explanation is clearly indicated by the fact that we merely followed identical principles and policies as were presented in the *Kress*, and many other, cases.

For the information of the Court and counsel we may say that we know of no case which better illustrates the conflict between the basic principles underlying workmen's compensation laws and the old common law concepts of damages—which appellee is here attempting to re-establish—which have been termed: "the absurd luxury known as personal injury litigation", *Foster v. Congress Square Hotel Co.*, 145 Atl. 400, 67 A.L.R. 239, 128 Maine 50.

The fundamental basis upon which the principles of workmen's compensation are erected, i.e. *rehabilitation of the injured workman*, is paramount. It was recently stated by *Marshall Dawson, Bureau of Labor Standards, U.S. Department of Labor*, in an address to the 36th Annual Convention of the International Association of Industrial Accident Boards and Commissions, in Milwaukee, Wisconsin, on September 26, 1950 (the applicable excerpt from which is presented as Appendix IV).

The record here discloses that every effort was made by appellee to enlarge upon his injuries, admittedly severe, and to exhibit them to the jury. The

emphasis placed thereon could only—in appellee's mind—create a mental condition unfavorable to recovery and rehabilitation.

Under the Arizona workmen's compensation law the Commission has a special fund and reserve set up for contributing additional compensation to educate and rehabilitate workmen injured as this man has been. Sec. 56-955, *A.C.A.*, 1939, provides for the setting up of a special fund for this purpose. Upon the present state of facts the Commission would probably have this man in college to get his degree as an electrical engineer. It has educated one injured man who was a telephone lineman to become a dentist, a miner lost his eye to become a chiropractor, a truck driver became a lawyer, as also did a miner who lost his arm; etc. We thereby curtailed money losses. On the other hand, this case, instead of costing \$50,000.00 may cost double that sum—were the man to become totally disabled so as to require constant medical care, or, in the case of his death.

Appellee relies on *Judson v. Fielding*. We do not think the case is apposite. It is not binding upon the Arizona Courts, nor upon this Court, for the reason that it was not decided prior to the adoption of the Arizona law; and, in effect, was repudiated by the legislature of New York. It construes Sec. 29 of the Workmen's Compensation Law of New York, before amendment.

For a history of the New York Act, see *Cauldfield v. Elmhurst Contr. Co.* (1945), 53 N.Y.S. (2d) 25, 268

A.D. 661. In 1937 the Massachusetts court reached a different conclusion from that of the New York court, in *Caira v. Caira*, 6 N.E. (2d) 431. So, also, did the Ohio court in *Rosenberger v. L'Archer* (1936), 16 Ohio St. 265, 31 N.E. (2d) 700, as well as the cases cited therein. Oregon, likewise, in *Gray v. Hammond Lumber Co.*, *supra*.

Another argument, which we think is very persuasive—that the legislature did not intend to permit suits between employees, who were both subject to the compensation law, for injuries by accident arising out of and in the course of employment—is the fact that the general trend in workmen's compensation cases (including Arizona) is to impose upon the employer the liability for injuries resulting from horseplay, assaults, and other causes, where it is now generally held that it is sufficient that the work brings the claimant within the range of peril by requiring his presence there when disaster strikes (*Horovitz "Current Trends in Workmen's Compensation"*, Assaults and Horseplay. 41 *Illinois Law Review* 339-341; Vol. 4 *N.A.C.C.A. Law Journal*, pp. 91-99, at page 98; Vol. 5, *N.A.C.C.A. Law Journal*, pp. 56-65, inc.; Vol. 12 *Law Society Journal*, May, 1947, No. 6; and, Vol. 25 *Indiana Law Journal*, pp. 573 and 575.

Finally, the evidence is conclusive that appellee accepted the benefits under the award, did not surrender them, and did not timely appeal the matter to the Supreme Court to have the award vacated. His voluntary offer to stipulate that the Industrial Commission

have a lien, of course, is without prejudice as to the rights of the intervenors-appellants, and was so understood between the parties when the stipulation was entered into.

Appellee's argument that a fellow servant *does not* bear the burdens of the compensation system is unsupported by the facts. The State bears part of the cost of the compensation system by providing the housing, lighting, heating, water, etc. The employer bears a maximum of 65% of an employee's loss, the employee assumes not less than 35% thereof, for permanent total disability and temporary total disability, and a decreasing amount for partial disabilities. His estate gets nothing if he leaves no dependents, and the compensation for dependents may be from 15% to 66 $\frac{2}{3}$ %, depending upon the number. Medical fees are regulated (Sec. 56-966, A.C.A. 1939). The rights of all persons under the system are co-relative.

THE INDEPENDENT CONTRACTOR THEORY.

Another illustration of the contradictory concepts of the theory of the workmen's compensation law, and appellee's contention, is indicated in his argument with reference to the matter of *independent contractors*. Appellee stresses, as controlling, the common law theory of "master and servant". The words "master" and "servant" do not appear anywhere in Art. XVIII, Sec. 8, of the *Constitution*, or in Art. 9, Chapter 56, A.C.A. 1939, as amended.

The workmen's compensation law is not restricted to the common law theory that an employee is a menial or a common laborer (appellee's brief, page 51). On the contrary, as provided in Secs. 56-928 and 56-929, A.C.A. 1939, the whole concept is an enlarged one. The mere size of the defendant is immaterial.

We concede that an agent may be an independent contractor. However, the contract in issue left no doubt on that score. The right of control was expressly retained by the Gas Company.

It would appear futile to attempt to analyze and distinguish within the course of a brief all the cases cited by appellee. In *Ariz.-Hercules Cop. Co. v. Crenshaw*, supra, the Court said:

“* * * to draw a distinction between independent contractors is often difficult, and the rules which courts have undertaken to lay down on the subject are not always of simple application.”

RESTATEMENT OF AGENCY.

With reference to the matter of restatement of agency, the Arizona Court has held that it will follow the “*Restatement of Agency*” if it is a matter of first impression. The matter is not one of first impression in Arizona, as is clearly indicated from the cases cited, and by the two volumes contained in the pocket supplement at the back of this authority.

The *McCrary* case (appellee's brief, page 45) shows many points of conflict with the facts here. The Court

Court noted the clear distinction made by the amendment (Text set out in Appendix V).

It is noted that the Arizona limitation is more strict than the Longshoremen's Act, both before and after amendment. The Arizona Act reads: "makes application for an award". The Longshoremen's Act reads: "acceptance of compensation under an award".

APPELLEE'S LACK OF KNOWLEDGE.

Another matter upon which we think some comment is necessary as raised by appellee's brief (page 76) is the alleged lack of knowledge, or ignorance, of appellee of his obligation to elect his remedy, if any. The evidence is clear, and the law is unequivocal (Art. XVIII, Sec. 8, Constitution) that the employee was given the right to exercise his option to settle for the compensation and he did so by failing to reject the provisions of the compensation law prior to the injury. Secs. 56-944, 56-945 and 56-946, *A.C.A.* 1939, prescribe the manner of election as between the employer and the employee, and impliedly between his co-employees (Sec. 56-949, *A.C.A.* 1939). And the latter afforded him an election as to third parties in the same employ.

Under the provisions of the Constitution and the statute he is charged with knowledge thereof, *S. H. Kress & Co. et al. v. Superior Court*, supra; as are also his dependents, *Corral v. Ocean Acc. & Guar. Corp.*, supra; although the law affords them a limited,

and special, remedy for the employee's death. *Kay v. Hillside Mines*, 54 Ariz. 36, 91 P. (2d) 867. *Rules of Commission* Nos. 70 to 76, inc., are designed to protect the rights of claimants.

Counsel argues that intervenors-appellants' position is predicated upon "technical rules". All of appellee's rights, and of all parties, are predicated on the statute. Appellee must bring himself within the provisions of the statute. The Commission has no jurisdiction nor right to extend benefits under any other theory. It must enforce the law impartially as between employer and employee, and third parties who may be affected thereby.

The cases and authorities cited by appellee on this question (pages 74 to 81 of his brief) are not apposite under the Arizona statute, and the facts in the case, upon the grounds: first, that the applicant at all times believed that he had a cause of action against the defendants; and, secondly, the statute upon which he relies provides no election as against a co-employee, as he contends on page 77 of his brief.

FINALITY OF AN AWARD.

In *Lee Moor Contr. Co. et al. v. Industrial Commission*, 65 Ariz. 300, 179 P. (2d) 786, the Arizona Supreme Court held that when an award of accident benefits and compensation is made, and becomes final by payment, and acceptance, without appeal, it is *res judicata* upon all parties. This accords with the pro-

visions of Sec. 56-950 A.C.A. 1939, and Rules 28 and 70 to 76, inc. of the *Rules of Procedure* before the *Industrial Commission*. Rule 72 reads:

“Acceptance of compensation constitutes election. Acceptance of compensation from the Commission, or other insurance carrier, shall be deemed to be an election to take compensation.”

The *Rules of Procedure* have been adopted under the general authority of the Commission to make such rules, Sec. 56-920, A.C.A. 1939; and have the effect of law. *Smith v. Industrial Commission*, 65 Ariz. 43, 173 P. (2d) 753; *Guy F. Atkinson v. Kinsey*, 61 Ariz. 127, 144 P. (2d) 547; *Nevitt v. Industrial Commission*, 70 Ariz. 172, 217 P. (2d) 1039.

INVITED ERROR.

Appellee urges, brief, page 72, that counsel invited error and is estopped to assert a different theory. Counsel did not invite error, and has adopted no different theory. The statement concerning our status has recently been affirmed by the Supreme Court of Arizona in *Orosco v. Industrial Commission*, unreported.

The argument appellee quotes, as we have previously stated, *in which the remarks were made*, related to rescission of election after receipt of compensation by a person *competent* to make an election, and not with the question of the right to sue a co-employee. Therefore, the argument and cases cited by appellee have no application here.

CONCLUSION.

The Gas Company asserts that an independent contractor is not involved here. The Industrial Commission insures not only the workmen's compensation liability of the Gas Company, but its employer's liability as well, including the cost of an action. In defending this case, as well as others of like nature, it acts in a Fiduciary capacity. *Sears Roebuck & Co. v. Harris*, 69 Ariz. 320, 213 P. (2d) 672.

An award unreversed by the Supreme Court is conclusive on all parties. *Lee Moor Contr. Co. v. Industrial Commission*, supra. The award in this case is unreversed. The Court has no jurisdiction to ignore the same.

The judgment of the trial Court should be reversed.

Dated, Phoenix, Arizona,
October 30, 1950.

Respectfully submitted,
H. S. McCLUSKEY,
Attorney for Intervenors-Appellants.

ROBERT E. YOUNT,
Of Counsel.

(Appendices I to V Follow.)



Appendix I

Article XVIII, Section 8—Constitution of Arizona

“(Workmen’s Compensation.)—The legislature shall enact a Workmen’s Compensation Law applicable to workmen engaged in manual or mechanical labor in all public employment whether of the state, or any political subdivision or municipality thereof as may be defined by law and in such private employments as the legislature may prescribe by which compensation shall be required to be paid to any such workman in case of his injury and to his dependents, as defined by law, in case of his death, by his employer, if in the course of such employment personal injury to or death of any such workman from any accident arising out of, and in the course of, such employment, is caused in whole or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its agents or employee or employees, to exercise due care, or to comply with any law affecting such employment; provided that it shall be optional with any employee engaged in any such private employment to settle for such compensation, or to retain the right to sue said employer as provided by this constitution; and, provided further, *in order to assure and make certain a just and humane compensation law in the state of Arizona, for the relief and protection of such workmen, their widows, children or dependents, as defined by law, from the burdensome, expensive*

and litigious remedies for injuries to or death of such workmen, now existing in the state of Arizona, and producing uncertain and unequal compensation therefor, such employee, engaged in such private employment, may exercise the option to settle for compensation by failing to reject the provisions of such Workmen's Compensation Law prior to the injury." (Emphasis supplied.)

Appendix II

Section 99, Chapter 83, Session Laws of Arizona (1925)

“WHEREAS, to assure and make certain a just and humane compensation law in the State of Arizona, for the relief and protection of workmen, their widows, children, and other dependents, from the burdensome, expensive and litigious remedies for injuries to or death of such workmen, now existing in the State of Arizona, *producing uncertain and unequal compensation therefor and engendering hatred and distrust between employee and employer*, an early operation of this Act is required to preserve the peace, health and safety, an emergency is hereby declared to exist and this Act is, therefore, hereby exempted from the operation of the referendum provisions of the State Constitution.” (Emphasis supplied.)

Appendix III

*“Status of Kress Case As It Relates to
Defendant Wise.*

“Wise was the Assistant Manager of the Kress store in Phoenix. He, upon the written representation of plaintiff that he was 16 years of age, employed the plaintiff during the school vacation and put him to work as a stock boy. Other than that, there are no allegations or showing that he had anything to do with the injury sustained by the plaintiff.

“Plaintiff, and defendant Wise, both were employees of the defendant Kress.

“All of the allegations with reference to employment, insurance, and compliance with the Compensation Law, and the defenses as to Kress, apply with like effect to the defendant Wise. Wise was the agent of Kress in employing the plaintiff.

“If plaintiff is subject to the workmen’s compensation law and it is his exclusive remedy, either on the point of being bound by its provisions by reason of his failure to elect to reject the act prior to injury, or in the alternative, by his application for, receipt, and acceptance of, compensation benefits under the order *Sections 56-950 and 56-967*, then plaintiff has no cause of action against Wise by reason of the following:

‘*Sec. 56-949. Liability of third person to injured employee.* If an employee entitled to compensation hereunder is injured or killed by the negligence or wrong of another *not in the same employ*, such injured employee, or in the case of

death, his dependents, shall elect whether to take compensation under this title or to pursue remedy against such other. If he elect to take compensation, the cause of action against such other shall be assigned to the state for the benefit of the compensation fund, or to the person liable for the payment thereof, and if he elect to proceed against such other, the compensation fund or person, shall contribute only the deficiency between the amount actually collected and the compensation provided or estimated herein for such case. Compromise of any such cause of action by the employee or his dependents at an amount less than the compensation provided for herein shall be made only with the written approval of the commission, or of the person liable to pay the same.' (Emphasis ours)

the point being that both claimant and Wise were in the same employ, and the defendant Wise may not be sued as a third party defendant."

Appendix IV

Excerpt from address to 36th Annual Convention
of International Association of Industrial Acci-
dent Boards and Commissions, Milwaukee,
Wisconsin, September 26, 1950,

by

Marshall Dawson, Bureau of Labor Standards,
U. S. Department of Labor

“In workmen’s compensation, rehabilitation as a goal must be kept in sight from the day of a worker’s injury. But in a damage suit, rehabilitation is kept out of sight and so far as possible out of mind until after a verdict has been won. Up to that point, in a damage suit it is necessary for the lawyer and the doctor to keep the injured person appearing as hopeless and forlorn as possible. This is even true of jury appeals in workmen’s compensation, found in a few States, as explained to me by the distinguished lawyer and former Ohio commissioner, Tom Duffy. The pathetic plight of the injured person and his family is exhibit No. 1 in the jury trial. The strategy is to imply that the insurance carrier is rich and that the injured person needs money. ‘That done,’ said Mr. Duffy, ‘getting a verdict is like taking candy from children.’ In such circumstances, a compensation commission is not only at the mercy of the legislature and the courts, but also of the lawyers.

“The distinction between liability and compensation attitudes cannot be over-emphasized, as to the effect upon a rehabilitation program. The director of a rehabilitation center told me of a young

amputee who enrolled in the center, had been fitted with artificial members, and was making excellent progress in an accounting course. He had been assured a good job upon the completion of his training. But one day he took off his artificial members and dropped the training course. He explained to the director that when he enrolled he had expected to accept a voluntary settlement of \$40,000 from his employer, but now a lawyer had told him that if he sued he could get more money. And his lawyer wanted to exhibit to the jury a helpless, not a rehabilitated person."

Appendix V

Quotation of foot-note, page 852, Volume 67 Supreme Court report of *American Stevedores v. Porello*; also reported in 330 U.S. 446, and 91 L. Ed. 1011.

“The statute formerly provided, 44 Stat. 1440: ‘Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election’.

“Under this form of the statute courts had held that acceptance of compensation precluded the employee from suing a third party tortfeasor. *Sciortino v. Dimon S. S. Corp.*, D. C., 39 F. (2d) 210, affirmed 2 Cir., 44 F. (2d) 1019; *Toomey v. Waterman S. S. Corp.* 2 Cir., 123 F. (2d) 718, *The Nako Maru*, 3 Cir., 101 F. (2d) 716, *Freader v. Cities Service Trans. Co.*, D. C., 14 F. Supp. 456. Contra, *Johnsen v. American-Hawaiian S. S. Co.*, 9 Cir., 98 F. (2d) 847.

“As amended the statute provides, 52 Stat. 1168: ‘Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.

“33 U.S.C. Sec. 933 (a), 33 U.S.C.A. Sec. 933 (a): ‘If on account of a disability or death for which compensation is payable under this chapter

the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person'."

No. 12,594

IN THE

**United States Court of Appeals
For the Ninth Circuit**

TUCSON GAS, ELECTRIC LIGHT AND POWER
COMPANY, a Corporation,
and

THE INDUSTRIAL COMMISSION OF ARIZONA,
a Public Agency,

Intervenors-Appellants,

vs.

JOHN E. HUBBELL and WILMA HUBBELL,
Appellees.

PETITION OR MOTION FOR A REHEARING.

H. S. McCLUSKEY,

Arizona State Building, 1640 West Adams Street, Phoenix, Arizona,

Attorney for Intervenors-Appellants.

ROBERT E. YOUNT,
Of Counsel.

FILED

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Appellees.

PETITION OR MOTION FOR A REHEARING.

*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

Come now intervenors-appellants, by their undersigned attorney, and pursuant to Rule 25 of the Rules of the United States Court of Appeals for the Ninth Circuit, and move the Court for a rehearing on its decision of March 14, 1951, in the above-entitled matter, and, without waiving, and continuing to rely upon our primary assignments, on the grounds following:

(a) That the Court erred in the premises in holding that, under the evidence and the law, Sanderson & Porter are independent contractors.

(1) The Court holds that the trial court “under the contract and the surrounding circumstances and evidence would support a finding either way”.

(b) That if there was a conflict in the evidence on the status of independent contractor—which intervenors-appellants can not find, and the opinion of the Court points out no such conflict—then under the law of Arizona the determination of the conflict was for the jury as contended by the defendant Porter et al., and such issue is jurisdictional.

(c) The Court, in determining the issue of “election of remedy” on the basis of a general provision of the Constitution (Article XVIII, Section 6) failed to give effect:

(1) to the special and qualifying provisions of Article XVIII, Section 8, as amended;

(2) to the provisions of the workmen’s compensation statute; and,

(3) to the Rules of the Commission (70-76, inc.) relating to election of remedies;

with which appellee was charged with the duty to know as a matter of law.

(d) The Court failed to pass upon the jurisdictional question that the award was *res adjudicata*, unless set aside on certiorari by the Supreme Court in the manner provided by the Arizona statute.

ARGUMENT ON ASSIGNMENTS OF ERROR NOS. (a) AND (b).

We respectfully contend that the assignments speak for themselves and that argument thereon would be redundant.

We respectfully contend that the decision fails to meet the issues tendered, in essential particulars. And, in the absence of a clear declaration as to whether the evidence is in conflict—which may be inferred from the decision—the opinion is ambiguous, and its reasoning is neither persuasive nor compelling, especially as the primary authority relied on, *Johnsen v. American-Hawaiian Steamship Co.*, 98 F. (2d) 847, 9th Cir. 1938, is foundationed on a premise of overreaching the plaintiff. There is no such evidence here.

As long as the decision leaves the issue in a twilight zone, no clear-cut conclusion is possible. Under all the facts, we, with the utmost respect, contend that the respective litigants are entitled to have these issues determined. It remains our view that there was no essential conflict in the evidence either on the employment status of Sanderson and Porter; or, on the matter of the Election of Remedies. The self-serving plea is not lack of knowledge but of “full” knowledge. We contend this is not the rule in Arizona.

ARGUMENT ON ASSIGNMENT OF ERROR (c).

It is the rule in Arizona in relation to constitutional and statutory construction that effect must be given to the whole of a section or chapter, and that special

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(1) The Court holds that the trial court “under the contract and the surrounding circumstances and evidence would support a finding either way”.

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(3) to the Rules of the Commission (70-76, inc.) relating to election of remedies;

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It is the rule in Arizona in relation to constitutional and statutory construction that effect must be given to the whole of a section or chapter, and that special

provisions control those that are geenal; *Home Owners Loan Corp. v. City of Phoenix*, 51 Ariz. 455, 77 P. (2d) 818; *State v. Lumbermen's Indemnity Exchange*, 24 Ariz. 306, 209 P. 294; and that when they are *in pari materia* they should be construed together so as to give effect to each if possible.

Sections 3 and 6 of Article XVIII of the Constitution deals with the subject of damages generally. These sections are modified by Section 8, as amended, which deals specially with proceedings for compensation or actions for damages "for injuries which arise out of and in the course of employment", and which include injuries caused by a third party.

As we read the decision, the Court failed to give effect to the election by appellee to abide the compensation law when he failed to reject its provisions in the manner provided by Sections 56-944 and 56-945, and made it his exclusive remedy under Section 56-946, including the election to make it his exclusive remedy against third parties under Sections 56-949 and 56-950, unless he made his election in the manner provided by the latter two sections and the rules of the Commission adopted in relation thereto, Rules 70-76, inclusive, which the Commission was empowered to adopt under the provisions of the statute.

Appellee was charged with knowledge of, and the duty to know, the provisions of the statute, and of these rules at the time he elected to be bound thereby under the provisions of Sections 56-944 to 56-946, 56-949, 56-950; *S. H. Kress Co. v. Superior Court*, 66

Ariz. 67, 182 P. (2d) 931. One of the primary purposes of the statute, and of these rules, is to expedite the payment of compensation benefits; and the statute unequivocally provides that "one who makes application for an award * * * waives any right to exercise any option to institute proceedings in any court".

There is no qualifying language in Sections 56-949 or 56-950 with reference to knowledge. The statute implies that when the appellee made his election to accept the compensation law he had knowledge of the law and the rules of the Commission and his rights thereunder. He was under notice of that effect, Section 56-944. *S. H. Kress Co. v. Superior Court*, supra.

The Court has wholly failed to give effect to the intent and purpose of the Act to expedite the early payment of claims and to eliminate, insofar as practicable where matters involving injuries by accident arising out of or in the course of employment are concerned, private litigation, and the regulation of medical and hospital fees, etc. (56-966). The Court, under the facts, in our opinion, gives undue weight to the interpretation of the word "election", and fails to even mention the rules of the Commission, which have been of long standing, interpreting the same. It is true, in the absence of an interpretation hereof by the Supreme Court of Arizona these particular rules are not binding on this Court, but they merit great weight. *Federal Land Bank of Berkeley v. Warner*, 54 S. Ct. 571, 292 U.S. 53, 78 L. Ed. 1120, 91 A.L.R. 380, reversing (1933) 23 P. (2d) 563, 42 Ariz. 201;

Copper Queen Consolidated Co. v. Territorial Board of Equalization, 84 P. 511, 9 Ariz. 383, affirmed 1907, 27 S. Ct. 695, 206 U.S. 474, 51 L. Ed. 1143. And the rules generally have been approved by the Court, *Guy F. Atkinson Co. v. Kinsey*, 61 Ariz. 127, 144 P. (2d) 547; *Smith v. Ind. Com.*, 65 Ariz. 43, 173 P. (2d) 753; and are held to have the force and effect of statutes.

We respectfully contend that the rules of the Commission are entitled to greater weight than mere meretricious verbiage, which in the language and the popular song of the day, amounts in effect to "I Didn't Know the Gun Was Loaded".

We repeat the decision is silent on these rules, and is contrary to the express language of the statute that "one who makes application for an award" is bound thereby (56-950).

ARGUMENT ON ASSIGNMENT OF ERROR NO. (d).

We refer to intervenors-appellants' reply brief, pages 19, 20.

The principles of *res judicata* apply to questions of jurisdiction as well as to other issues, and as well to jurisdiction of the subject matter as of the parties. *Johnson v. Muelberger*, 71 S. Ct. 474, Advance Sheet No. 9.

It is respectfully submitted, therefore, that, upon the present state of the record, the Court in the judg-

ment of counsel is in error and the case should be reversed.

Dated, Phoenix, Arizona,
April 2, 1951.

Respectfully submitted,
H. S. McCLUSKEY,
Attorney for Intervenors-Appellants.

ROBERT E. YOUNT,
Of Counsel.

No. 12,594

IN THE

**United States Court of Appeals
For the Ninth Circuit**

TUCSON GAS, ELECTRIC LIGHT AND POWER
COMPANY, a Corporation,
and

THE INDUSTRIAL COMMISSION OF ARIZONA,
a Public Agency,

Intervenors-Appellants,

vs.

JOHN E. HUBBELL and WILMA HUBBELL,
Appellees.

CERTIFICATE OF COUNSEL IN SUPPORT OF PETITION
OR MOTION FOR REHEARING.

State of Arizona,
County of Maricopa.—ss.

H. S. McCLUSKEY, Attorney of Record in the afore-
entitled action, herein and hereby certifies: that he has
read the foregoing Motion for Rehearing and the
evidence in support thereof, and in his judgment the

Motion is well-founded; that it goes to the merits of the litigation, and is not interposed for delay.

Dated, Phoenix, Arizona,
April 2, 1951.

H. S. McCLUSKEY,

AUTHORITY.

Rule 25, Rules of the Circuit Court of Appeals,
Ninth Circuit, O'Brien's Manual, Supplement No. 4,
page 18.

No. 12,594

IN THE
United States
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For the Ninth Circuit

P. G. TAYLOR, SEATON PORTER, HENRY W.
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FRANCIS BLOSSOM, D. J. WALSH, HARRISON
SMITH, P. S. PELLETIER, WYNN MEREDITH,
Individually and Doing Business as SANDER-
SON & PORTER, and SANDERSON & PORTER, a
Partnership,

Appellants,

vs.

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Appellants,

vs.

JOHN E. HUBBELL and WILMA HUBBELL,

Appellees.

Petition of P. G. Taylor, et al., Appellants, for
Rehearing and Argument in Support

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IN THE
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Appellants,

vs.

JOHN E. HUBBELL and WILMA HUBBELL,
Appellees.

**Petition of P. G. Taylor, et al., Appellants, for
Rehearing and Argument in Support**

P. G. Taylor, et al., appellants, respectfully petition the
court for a rehearing on the following grounds:

(1) The court erred in holding that the issue of election
of remedy was properly tried by the Court;

(2) The court erred in holding that the issue as to identical employ (to use the court's apt expression) was properly tried by the court.

(3) We realize that no argument could be advanced in support of our specifications of error, 1(a) and 1(b), (wherein we contended that on the undisputed evidence we were entitled to the judgment of the court that we were in identical employ with Appellee, John E. Hubbell, that said Appellee did elect to accept compensation, and that said Appellee had not exhausted his remedies through the Commission) that would not be repetitious of what we have already stressed; and, so, without abandoning those contentions, we merely mention them to preserve our rights.

ARGUMENT

So far as our specifications 2(a) and 2(b) are concerned, the court, as we understand the opinion, agreed that there was substantial evidence pro and con on the issues of election of remedy and identical employ but held that we were not entitled to have those issues submitted to the jury.

Hence, our grounds (1) and (2) above.

In answer to our specifications 2(a) and 2(b)—that if there was substantial dispute in the evidence on said issues, we were entitled to a trial by jury thereon—no point was made by Appellees in their brief that such issues, or either of them, were for the Court's exclusive determination. On the contrary, Appellees' counsel cited as correctly stating the rule as to identical employ the following:

“As in civil actions generally, where the evidence on a material issue in actions involving the relation of master and servant is conflicting or admits of more than one inference, the question thereby raised is one

of fact for the determination of the jury; otherwise the question is one of law for the court." 56 C.J.S. P. 92.

The judgment consequently is affirmed on a theory evolved by the court—one which we at no time heretofore have had an opportunity to consider or discuss.

The court's statement:

"It is axiomatic that 'every court of general jurisdiction has power to determine whether the conditions essential to its exercise exist.' (Texas & Pac. Ry. v. Gulf Ry., 270 U.S. 266, 274 (1926); see Rhode Island v. Mass., 12 Pet. (37 U.S.) 657, 718-720 (1838).) Here the district court had jurisdiction of the subject matter only if plaintiff and Sanderson & Porter were 'not in the same employ' and if plaintiff had not made an election under the statute to take compensation. (S. H. Kress & Co. v. Superior Court, *supra*, 66 Ariz. 67, 182 P.2d 931). Being jurisdictional, these issues were triable to the court, not the jury. And the district court properly withheld them from consideration by the jury. (See Weaver v. Martori, 69 Ariz. 45, 208 P.2d 652 (1949); State v. Phelps, 67 Ariz. 215, 193 P.2d 921, 924 (1948); Dolese Bros. v. Tollett, 162 Okla. 158, 19 P.2d 570 (1933)."

We submit that this is an incorrect interpretation of the Arizona statutes and decisions.

Subject Matter of This Action

The subject matter of this action is a claim at common law for personal injuries due to negligence. While the plaintiffs alleged the employment of John Hubbell by the power company and alleged affirmatively that Sanderson and Porter were independent contractors and also that any

purported election on his part to take compensation was not binding on him, there was no need or occasion for those allegations. A simple complaint alleging the negligence of Sanderson and Porter would have placed his case in court. This would have required the defendants to allege affirmatively identical employment and/or election by Mr. Hubbell to take Compensation.

It is respectfully submitted that those issues in such a case would be, and that in this case they were, such as might be raised by a denial of negligence, a plea of contributory negligence, release and discharge, etc. Each and all of those defenses are jurisdictional, in that if sustained the defendants would have judgment. The classification of some as jurisdictional and the others as ordinary defenses, so that the former must be tried by the judge alone and the latter by the jury, is, we believe, utterly foreign to the practice prevailing in Arizona.

As support for the proposition that the issues in question go to the jurisdiction of the court over the subject matter, the court cites:

S. H. Kress v. Superior Court, supra

This case was an application for a writ of prohibition against the Superior Court to prevent it from entertaining jurisdiction in a case where the complaint alleged that the plaintiff was a minor, age 13, was illegally employed by the defendant and not bound by an election to take Compensation through failure to reject the same. The substantial question in the case was whether an infant of that age, being illegally employed, could waive his right to a common law action against his employer. The court held that such

a minor was bound by the provisions of the Compensation Act and that his sole claim was one of Compensation under that Act.

It is true that the court granted a writ of prohibition but we call the court's attention to the last paragraph of the opinion in which, in apologetic language, the court points out that it would not ordinarily assume jurisdiction by writ of prohibition in a matter of that kind and did so only because of the exigencies of the case, which it pointed out. There is language in this case indubitably to the effect that a trial court ought not to assume jurisdiction of a suit by an employee against his employer where he alleges in his complaint facts showing clearly that he has no relief except under the Compensation Act. It is nevertheless clear that the Court was in serious doubt as to the jurisdictional feature of the case and proceeded only for the purpose of putting at rest the long delayed determination of the rights of infants in illegal employment.

Had the action in the *Kress* case been by a plaintiff alleging that he was an invitee of the defendant or that he as an employee was excused from making any election because of the failure of the defendant to post the notices required by law, or that the defendant had wilfully inflicted injuries upon him, (instances excusing an election), it would have been incumbent upon the defendant to raise the issue that the plaintiff was an employee insured under the Compensation Act. That would not defeat the jurisdiction of the court over the subject matter of the action, but would if sustained, defeat the action itself. In that sense it might be considered "jurisdictional." But that either party could demand a jury trial on the issue, we submit is clear under our Arizona practice.

In support of the proposition advanced by this court that the district court properly withheld these issues from the consideration by the jury, the *Weaver*, *Phelps* and *Oklahoma* cases set forth in the above quotation are cited.

In the *Weaver* case, *supra*, an eleven-year old child was injured while placing or kicking cantaloupes on a conveyor belt of Martori. Through a guardian ad litem he filed suit for damages in the Superior Court against Martori, alleging facts showing that he was Martori's employee and that he had not rejected the provisions of the Compensation Act. His counsel's theory, no doubt, was that a child of that tender age could not waive his right to sue his employer. Since under the *Kress* case this eleven-year old boy was deemed to have made an election to accept compensation, it is apparent that his case would have to be dismissed because of his presumed election—not for any jurisdictional reason. Martori removed it to the Federal Court which sustained his motion for summary judgment, the reason being as indicated above; and then the child through a guardian filed for compensation with the Commission. He lost out again because the court held he was not an employee. The court, however, rejected the Commission's contention that the infant had elected to sue at law because, it held, the guardian ad litem had no power to bind the infant to an election, though the infant himself could so bind himself by failing to reject the Compensation Act. Had the child in the first place through a guardian ad litem filed his suit on the basis of not being an employee (invitee, attractive nuisance, etc.), the Court would have surely had jurisdiction even though defendant had pleaded the contrary. After all this litigation, he no doubt still had that

right, and to a trial by jury if the issue of election were raised.

The *Phelps* case was a mandamus by the State of Arizona to Judge Phelps, then on the Superior bench, that he proceed to try a criminal matter which he thought was beyond his jurisdiction. The court took the other view and said, among other things, that the first duty of the court is to determine whether it has jurisdiction.

We think it not inappropriate to call to the court's attention the court's discussion of "jurisdiction."

67 Ariz. 215 at 220, 193 P.(2) 921 at 925.

"In *Tube City Min. & Mill Co. v. Otterson*, 16 Ariz. 305, 146 P. 203, 206, L.R.A. 1916E, 303, this court said: 'The test of jurisdiction is whether or not the tribunal has power to enter upon the inquiry; not whether its conclusion in the course of it is right or wrong. (Citing cases.)'

"In this *Tube City* case our court quoted with approval from *Manley v. Park*, 62 Kan. 553, 64 P. 28, as follows: 'Jurisdiction over the subject-matter' is the right of the court to exercise judicial power over that class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending; and not whether the particular case is one that presents a cause of action, or, under the particular facts, is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial. * * * By 'jurisdiction over the subject-matter' is meant the nature of the cause of action and, of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred. * * * The power to determine and decide a case includes the power to decide

it wrong as well as to decide it right. See also *Bates v. Mitchell*, 67 Ariz. 151, 192 P.2d 720.”

The *Oklahoma* case, *supra*, is concededly similar to our own—a suit allegedly against one not in the same employ. The defendants sought to show that the plaintiff had made an election to take compensation under the Act. It was contended that the trial court erred in refusing to so hold and also erred in refusing to submit the question to the jury. The decision of the court on that subject is as follows:

“(1) A trial court is required to determine the legal question of whether or not it has jurisdiction of the subject-matter of an action presented to it for determination. If it does not have jurisdiction of the subject-matter of the action, it cannot legally impanel a jury to submit any question to a jury. It is neither authorized nor required to submit to a jury the question of whether or not it has jurisdiction of the subject-matter of an action.” 19 P.(2) 571

It may be that the court had in mind that a disputed issue of fact on the question of election was for the judge alone to determine but we suggest that a reasonable conclusion may be derived from the opinion that there was no dispute in the evidence on that score. See discussion under paragraph (2) of the opinion. In any event this *Oklahoma* case has no binding force in Arizona. Surely here, in a case of this sort, there can be no question of the right to impanel a jury. No doubt, there are many points of similarity in the constitutions and laws of the two states on this subject but there are many points of difference and we do not think the law on this important subject should be announced for the courts of Arizona on the basis of an *Oklahoma* decision.

This is not an action by an employee against his employer—both subject to the jurisdiction and order of the Industrial Commission, unless the employee has affirmatively rejected the Act. An alleged stranger to the employment relation is involved. When he pleads that the plaintiff was in the employ of another and affirmatively elected to take compensation from him or his insurer, he is doing no more than alleging that the plaintiff does not own any cause of action against the defendant. The court went to extreme lengths in the *Kress* case (apologetically) and surely will not extend the jurisdictional theory further.

From the case of *Moseley v. Lily Ice Cream Company*, 38 Ariz. 417, 300 Pac. 958, we quoted in our opening brief at page 33. That was an action against a third party in which the defendant undertook to claim that the plaintiff had made an election to accept compensation from his employer. The plaintiff countered his purported election was not binding upon him. The court declared an election "made in a case of this nature just as in any other case is subject to be set aside for many reasons. But this issue must be raised by the pleadings." The decision of election in other cases would, of course, be for the jury and not the court. Had the court contemplated that it was for the judge alone to decide, and not the jury, (heresy in Arizona) it would certainly have said so.

The Issues Should Have Been Left to the Jury Whether They Were Jurisdictional or Not

Even if we assume that the court is correct in saying that the jurisdiction of the court over the subject matter depended upon its conclusion that the Plaintiff, John Hubbell, and these defendants were not in the same employ and

that no election of remedies had been made, it does not follow, we respectfully submit, that those issues should have been left to the determination of the court alone. On the contrary, we believe the general rule is applicable here. It is well stated in 21 C.J.S., Courts, Section 112, Page 170:

“The question of jurisdiction will be determined without regard to hardship or the merits of the case, and, in general, so as to sustain the court’s jurisdiction where possible. It is to be determined in the first instance from the pleadings, being primarily a question for the court, although disputed questions of fact are for the jury. One who seeks action by a court has the burden of demonstrating its jurisdiction to grant the relief sought.”

The right to a trial by jury is jealously guarded in Arizona. In all actions whether sounding in law, or in equity, the parties are entitled to have disputed issues of fact submitted to the jury. The verdict of the jury has the same binding effect in common law actions as it has at common law; and while the court may disregard the verdict of the jury in an action sounding in equity, it must nevertheless at the demand of a party submit the issues of fact to the jury, and “harken” to its conclusion.

Mounce v. Wightman, 30 Ariz. 45, 243 P. 916

We respectfully submit therefore that the District Court had jurisdiction of the subject matter of this action at all times from the inception of the removal proceedings; that the issues of identical employ and election of remedy were like all the other issues of fact in the case, for the determination of the jury; that the distinction made by this Court between those issues of fact and the others, so far

as the right to a jury trial is concerned, runs counter to the constitution of the United States (7th Amendment) and to the Constitution, laws and decisions of Arizona.

A rehearing is respectfully requested.

Dated: April 11, 1951.

CONNER & JONES

By GERALD JONES

No. 12,595

IN THE

United States Court of Appeals
For the Ninth Circuit

ROBERT STROUD,

Appellant,

VS.

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLANT.

ROBERT STROUD, No. 594,
Alcatraz, California,

In Propria Persona.

FILED

OCT 30 1950

PAUL P. O'BRIEN,
CLERK

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**United States Court of Appeals
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vs.

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Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLANT.

JURISDICTION.

I.

This case involves a petition for an injunction filed by an inmate of Alcatraz against the warden of that institution in which the inmate attempts to restrain the warden from interfering with his property rights by unreasonable interference with his correspondence with his business agent, and seeks other redress (R. 2, 17).

II.

The petition filed in the United States Court for the Northern District of California, Southern Division,

hereinafter referred to as the District Court, alleges that appellant has been and is being deprived of his property rights by said warden acting under color of a statute of the United States (R. 2, 3, 16); that the actions complained of are the result of a conspiracy to deprive appellant of his property rights without due process of law (R. 3, 14); and that as a part of said conspiracy there has been issued an unconstitutional order of an executive agency of the United States which has served as a pretext for the actions complained of (R. 4, 15).

Under these circumstances, the District Court had jurisdiction of the original proceeding pursuant to sections 43 and 47 of Title 8, U.S.C., and sections 1343, 1442, 2282 and 2284 of Title 28, U.S.C. (R. 4).

III.

Attached to the original petition filed in the District Court was a motion praying for the production of appellant in court for the purpose of presenting this action *in propria persona*, which the District Court had jurisdiction to grant pursuant to section 1651 of Title 28, U.S.C., and the Supreme Court's opinion in *Price v. Johnston*, 334 U.S. 226-291; 68 S.Ct. 1049 (R. 18).

IV.

Pursuant to section 1291 of Title 28, U.S.C., this court has jurisdiction to review all final orders of the District Court.

ACTION BELOW.

On March 20, 1950, appellant filed in the District Court a petition for an injunction (R. 2-48) restraining E. B. Swope, Warden of the United States Penitentiary of Alcatraz, California, from unlawful encroachments upon the property rights secured to the appellant by the Constitution and Laws of the United States, and asking for other redress (R. 2, 16-17).

On March 21, 1950, District Judge Louis E. Goodman denied the petition and dismissed the action (R. 48). And it is from that order that the petitioner, the appellant herein, brings this appeal.

LEGAL HISTORY.

I.

The present action is the third in which the appellant, who is untrained in law, has attempted, probably ineptly, to secure a judicial determination of property and other rights secured to him by the Constitution and Laws of the United States in actions based upon the operation of the aforesaid conspiracy, of which he has been the victim for nineteen years.

II.

In April, 1943, shortly after arriving at Alcatraz, he filed a petition for writ of habeas corpus in the District Court, *Stroud v. Johnston*, No. 23817 on the docket of the District Court.

The petition was denied and the action dismissed in a memorandum opinion filed by Judge Goodman on May 7, 1943. An appeal was allowed to this court and the action of Judge Goodman was affirmed in *Stroud v. Johnston*, No. 10527, in an opinion filed in this court on December 10, 1943.

Both the District Court and this Court held that the matter could not be tried on habeas corpus, and it was the opinion of practically all inmates of Alcatraz at that time that no other action could be employed by an inmate.

III.

On September 9, 1948, following the reading of Judge Denman's dissents in *Price v. Johnston*, 159 F. (2d) 234 and *Sanders v. Johnston*, 159 F. (2d) 74, in which the correct procedure in such cases is explained, appellant filed in the District Court a petition for an injunction alleging unlawful invasion of his property rights in violation of section 43 of Title 8, U.S.C. (*Stroud v. Swope*, No. 28295 on the docket of the District Court).

On September 15, 1948, there was a hearing before District Judge Dal M. Lemmon, sitting for Judge Harris, who was either indisposed or otherwise engaged, at which appellant was represented by two attorneys, Mr. William Fallon, 111 Sutter Street, San Francisco, appointed by Judge Harris to represent appellant, and Mr. Jacques Leslie, 275 Beverly Drive, Beverly Hills, California, employed by appellant's agent to represent him without consulting appellant.

At the hearing, Mr. Leslie made an oral argument which was wholly unresponsive to the issues before the court and which the appellant now knows was done deliberately, with the intention of causing the action to be dismissed, at the instigation of another client, Mr. Richard Palomar, who hoped to induce appellant's agent, L. G. Marcus, to sign a contract giving Mr. Palomar the moving picture and television rights to the story of the appellant's life under terms not favorable to the interests of appellant.

The petition in that case, although legally sufficient, had been drawn at a time when the appellant was under great physical and mental stress and was not nicely drawn.

Judge Lemmon felt that in view of the fact that appellant was represented by attorneys at the hearing, the pleadings should be properly drawn. In a memorandum opinion filed on December 7, 1948, he dismissed the action without prejudice and with leave to amend the pleadings, pointed out some of their shortcomings, and allowed ten days in which to file the new pleadings.

C. W. Calbreath, Clerk, failed to serve copies of Judge Lemmon's opinion and order upon appellant's attorneys within the time limit specified.

Upon learning of the opinion, William Fallon contacted Judge Harris and was assured by Judge Harris that he would make no issue of the time and that the

new pleadings could be filed at the convenience of attorneys (see R. 7, 8, paragraphs VII, VIII, and Exhibit A, R. 29-34).

Mr. Fallon informed appellant that he had no facility for preparing legal papers.

Mr. Leslie promised appellant that he would prepare the new papers at once, and continually and repeatedly renewed that promise over a period of one year, at the end of which time it became obvious to appellant that Mr. Leslie had never at any time had any intention of conforming to Judge Lemmon's ruling or of properly representing the appellant (R. 33-34).

IV.

Under these circumstances, appellant drew the new pleading himself, conforming to the best of his ability to the suggestion of Judge Lemmon and using more recent overt acts by the appellee as a basis for the action, and filed his petition as a completely new action, and that is the action which he now brings before this court on appeal.

STATEMENT OF CASE.

I.

This case involves a petition for an injunction and other relief brought by an inmate of Alcatraz against the warden of that institution in which the inmate seeks to restrain said warden from interfering with

his lawful and reasonable correspondence with his business agent, Mr. L. G. Marcus, other encroachments upon his property rights, and judgment for actual damages suffered by appellant as a result of encroachments upon his property rights by the appellee (R. 16-17, Prayer).

II.

The petition (R. 2-48) was filed in the District Court on March 20, 1950, was assigned to Judge Louis E. Goodman, and was arbitrarily dismissed by a one-sentence order filed on March 21, 1950 (R. 48) and it is that order that forms the basis of this appeal (R. 49).

III.

The appellant is serving a life sentence and, since 1916, has been continuously confined in solitary confinement, and for the last eight years he has been confined in solitary confinement in Alcatraz. For many years while confined at Leavenworth, he devoted himself to raising birds and carrying on research in the fields of Avian Pathology; Hematology; Bacteriology; and Therapeutics, with the result that he became widely and favorably known among scientists and bird fanciers throughout the world as the leading authority on the diseases of pet birds and as a writer.

This activity had been going on with the approval of various Attorneys General for many years prior to the establishment of the Federal Prison Bureau;

the appellant had made many important scientific discoveries, and had, by his efforts, established business interests beyond the prison walls.

In 1931, Sanford Bates created conditions making it impossible for the appellant to carry on by ordering Thomas B. White to stop the appellant from buying supplies for his birds.

The appellant, being unfamiliar with legal processes, but not unfamiliar with the arts of writing and salesmanship, had the temerity to challenge the authority of the Bureau before the court of public opinion.

When the appellant's publicity campaign broke on October 4, 1931, Sanford Bates excused his conduct by plucking out of thin air a rule not previously promulgated but prior-dated to July 1, 1931, so that it would not look as if it had been invented for the occasion, to the effect that prison inmates were not allowed to conduct business by correspondence (R. 3, 16). But he came up with the bright idea of having appellant's business socialized under the Prison Industries, Inc., and had contracts drawn to the effect.

Four hundred and thirty-one members of Congress made representation to Mr. Bates, and some of them told him bluntly that they had not voted him the power he possessed to have it used to destroy any man's property, the fruit of years of industry and good conduct. Others informed him that he had better pay more attention to the Constitution of the United States and less to the doctrines of Karl Marx.

Mr. Bates was forced to abrogate his rule so far as appellant was concerned, but thereupon, while publicly pretending to encourage the appellant, Sanford Bates, James V. Bennett, Austin H. McCormick, Fred G. Zerbst, and many other officials of the Federal Prison Bureau entered into a conspiracy to destroy appellant's property and make it impossible for appellant to ever obtain funds by any lawful means whatsoever that he might use to expose the machinations of the Federal Prison Bureau or create public pressure for his release. That conspiracy still exists and the appellee herein is a party thereto (R. 3, 5, 16).

IV.

Attached to the original petition filed in the District Court was a motion praying for an order for the personal appearance of the appellant for the purpose of prosecuting his action before the District Court *in propria persona* (R. 18).

V.

The petition alleges unlawful invasion of the property rights of the appellant (R. 3, 9, 12) by the appellee (R. 5, 9, 12, 16) by interference with the communications of appellant with his business agent and others (R. 9, 12), and attached thereto are two examples of the type of communication interfered with (Exhibit A, R. 29, and Exhibit B, R. 22).

VI.

The petition further alleged that all acts complained of are a result of the aforementioned con-

spiracy (R. 3, 5, 14); that the purpose of said conspiracy is to damage appellant in his property rights (R. 3-4, 6, 16); that appellant has suffered serious financial loss as a result of the actions of appellee (R. 12, 16); that said actions have been taken pursuant to an unconstitutional order of an executive agency of the United States (R. 4, 15); asked the court to restrain the appellee (R. 17) from enforcing said order and to declare said order null and void because of repugnance to the Constitution of the United States; and that the court render judgment for the appellant in the amount of his actual financial loss (R. 18).

QUESTIONS PRESENTED.

I.

Does a citizen of the United States, even though incarcerated in a penitentiary, retain property rights that his keepers are bound to respect?

II.

Are his rights to own property protected from official encroachment and conspiracy by sections 43 and 47 of Title 8?

III.

Are the facts alleged in the petition (R. 2-48) filed in the District Court, if true, sufficient to entitle appellant to the relief prayed for?

IV.

Does a single District Judge have authority to dismiss a petition for an injunction seeking to restrain an employee of the United States from enforcing an order of an executive agency of the United States on the grounds that said order is repugnant to the Constitution of the United States?

V.

Does appellant, an inmate of Alcatraz, in view of the facts set out in his motion (R. 18), have a right to prosecute this action in *propria persona*?

 ARGUMENT.

ONE.

APPELLANT CONTENDS THAT AS A CITIZEN OF THE UNITED STATES HE RETAINS ALL THE PROPERTY RIGHTS OF OTHER CITIZENS OF THE UNITED STATES, AND THAT HIS KEEPERS ARE BOUND BY LAW TO RESPECT THOSE RIGHTS.

I.

In his *Summary of Allegations*, paragraphs I to V (R. 13-14) appellant has claimed certain property rights that under our Constitution and Laws are secured to all persons, and he contends that possession of property, as a matter of reason, presupposes the right to sell, bequeath, or transfer said property in any lawful manner whatsoever, since anything less is an encroachment upon ownership.

Appellant calls the court's attention to *Coffin v. Reichard*, 143 F. (2d) 443, wherein the court said:

"A prisoner retains all the right of the ordinary citizen except those expressly, or by necessary implication, taken from him by law. While the law takes his liberty and imposes a duty of servitude and observance of discipline for his regulation and that of other prisoners, it does not deny his right to personal security against unlawful invasion."

"When a man possesses a substantial right, the courts will be diligent in finding a way to protect it."

Under the Fifth Amendment to our Constitution the fundamental rights are *life, liberty, and property*. No further comment upon the implication of this opinion is necessary.

II.

In the case of *Stroud v. Swope*, No. 28295 on the docket of the District Court, an action in which appellant attempted to raise the same issues presented here, District Judge George B. Harris, at a hearing on October 11, 1948, commenting from the bench, said:

"To deprive any man of the fruits of his mental industry is to destroy that man."

III.

On December 7, 1948, *Stroud v. Swope*, No. 28295, was dismissed without prejudice with leave to amend, as previously pointed out (*Legal History*, section III,

infra) by District Judge Dal M. Lemmon, who on page 3 of his memorandum opinion said:

“That the petitioner has property rights in his book is unquestioned. Yet, if the interference with his correspondence is unreasonable and is unjustified as a prison regulation and injures his property rights such rights may be and should be protected by the equitable remedy of injunction . . .”

The law on this point is well settled so there is nothing to be gained by belaboring it further. It is true that appellant has been deprived of his liberty by due process of law, and those in authority over him have a duty to retain custody of his person and to maintain order in the institution to which he is committed, but at that point their duty and their authority ends. They have no jurisdiction over his property, whether that property is land or money given or bequeathed to him or, like his book, due to the creative activity of his mind, so long as he devotes his property to lawful purposes.

TWO.

THE APPELLANT CONTENDS THAT HIS RIGHT TO OWN PROPERTY MAY BE PROTECTED FROM OFFICIAL ENCROACHMENT AND CONSPIRACY BY SECTIONS 43 AND 47 OF TITLE 8, U.S.C.

I.

Section 41 of Title 8 gives statutory force to the rights guaranteed by the 5th and 14th amendments, and clearly states that *all persons* shall have equal

rights under the law and security in their persons and property. It does not say *all persons except prison inmates*, and there is no case in the code annotated where it has been so construed. (Title 8 and 9 Annotated. West Publishing Company. See Pocket Part up to 1948.)

Section 43 provides for civil redress where the citizen is injured in his property rights by official encroachment.

Section 47 provides for civil redress where the encroachment and injury is the result of a conspiracy by any two persons.

Section 1343 gives the United States District Courts jurisdiction of civil rights cases. There is no case law holding that these sections do not apply to the Federal convict the same as to all other persons.

II.

Appellant calls the court's attention to Circuit Judge Denman's dissenting opinions in *Sanders v. Johnston*, 159 F. (2d) 74, and in *Price v. Johnston*, 159 F. (2d) 234.

The *Sanders* case was not appealed because the issue became moot.

The *Price* case was carried to the Supreme Court, which not only sustained Judge Denman's dissent, but actually enlarged and expanded it. (*Price v. Johnston*, 334 U. S. 266-291; 68 S.Ct. 1049).

No further argument is necessary.

THREE.

APPELLANT CONTENDS THAT THE FACTS ALLEGED IN HIS PETITION (R. 2-48), IF TRUE, ARE SUFFICIENT TO ENTITLE HIM TO THE REDRESS HE SEEKS (R. 16-17).

No argument on this point is necessary. A large amount of case law could be cited, but it would all be redundant. The petition itself alleges all the elements mentioned in the statutes, and nothing more is required. A careful reading of the annotation of civil rights cases up to and including 1948 (See Pocket Part, Title 8 and 9 Annotated) discloses no case to the contrary.

FOUR.

APPELLANT CONTENDS THAT THE SINGLE DISTRICT JUDGE HAS NO AUTHORITY TO DISMISS ANY ACTION IN WHICH THE PETITION SEEKS TO RESTRAIN A GOVERNMENT EMPLOYEE FROM ENFORCING AN ORDER OF AN AGENCY OF THE UNITED STATES ON THE GROUND THAT SAID ORDER IS REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES.

I

In paragraph III of the *jurisdictional statement* (R. 4) the petition alleges that all acts complained of have been done under the legal pretext of complying with an unconstitutional order of the Prison Bureau.

(Note: Through some typographical error the word *Board* appears in the printed record where the word *Bureau* was intended. In the original text on file in the District Court the word *Bureau* was employed.)

II

In paragraph II of *Statement* (R. 5) appellant alleges that he was robbed of all proceeds from his book, *Diseases of Canaries*, as the result of a conspiracy within the Federal Bureau of Prison, while in paragraph VIII, *Summary of Allegations* (R. 15) the petition contains the allegation that the first act of said conspiracy was the issuance of an unconstitutional order by the Federal Prison Bureau. While in paragraph IX (R. 15) appellant alleges that said order was directed at him personally and is *wholly repugnant to the Constitution*.

III

In his prayer, (R. 16-17) appellant prays that the court issue a permanent injunction declaring said order repugnant to the Constitution and forever restraining the appellee from enforcing it.

IV

These allegations are sufficient to bring the case under sections 2282 and 2284 of Title 28. The latter section provides for the procedure to be followed in such cases and is clear and unambiguous in its terms.

Subsection (1) of Section 2284 provides that the District Judge to whom a petition is submitted shall file same and notify the Chief Judge of the Circuit Court. Subsection (5) provides that the action shall not be dismissed by a single judge.

Under these circumstances in the face of the clear provisions of the statute, Judge Goodman's action in

treating the petition as one for a writ of habeas corpus is so arbitrary and capricious as to amount to an abuse of power and a total failure to perform the judicial functions of his office.

FIVE.

APPELLANT CONTENTS THAT EVEN THOUGH HE IS AN INMATE OF ALCATRAZ, HE HAS A RIGHT TO PROSECUTE THIS ACTION HIMSELF BOTH HERE AND BEFORE THE DISTRICT COURT FOR THE FOLLOWING REASONS:

- a. That as a result of the conspiracy previously mentioned (R. 3, 5, 15, 16) for eleven years at Leavenworth, 1931 to 1942, he was consistently refused permission to see or write to an attorney or to write to the United States attorney. That attorneys he got word to who came to the prison to see him were consistently turned away and refused permission to talk to him.
- b. Letters of protest addressed to the United States Attorneys for Kansas and for the Western District of Missouri were returned to him by Fred G. Zerbst and by Isaac Sway who told him that they had orders from the Federal Bureau of Prison not to permit him to start any action which might cause unfavorable publicity for the Bureau.
- c. For almost five years at Alcatraz appellant was refused permission to see an attorney. During this period, April, 1943, he asked

Judge Louis E. Goodman to appoint him an attorney. The request was denied.

- d. In the Fall of 1946 appellant managed to talk to several attorneys. One of them, Frank Burns, 111 Sutter Street, San Francisco, frankly told appellant that he, Burns, deeply sympathized with him but could do nothing for him. That he had a wife and family and a living to make and that he could not afford to offend the Prison Bureau. Another, Ernest Spagnoli, agreed to visit petitioner and go into his case following the trial of Thompson executed for a part in the mutiny of 1946, but following that trial Mr. Spagnoli was refused permission to see the appellant, and appellant was told that he could write to any attorney in the Bay Area, excepting Mr. Spagnoli.
- e. In case No. 28295, appellant's case was deliberately bungled and permitted to go by default by his attorney, Jacques Leslie.
- f. Appellant has no attorney, has no funds to employ an attorney, and knows of only one attorney practicing in this district whom he would care to trust to handle his affairs, since he is not the only man in Alcatraz who has been told by San Francisco Attorneys that they could not afford to offend the Prison Bureau, or who has had good clear cases bungled by deliberate mismanagement. To ask that one attorney to handle his case with-

out pay and suffer further harassment at the hands of the F. B. I. would be unfair.

In *Price v. Johnston*, 334 U.S. 266 at page 12 of the printed opinion of the court (the writer does not have the reporter, but it would probably be at page 277 or 278), the court said:

“In such situations where oral argument is slated to take place fairness . . . demands that both parties be accorded an equal opportunity to participate in the argument either through counsel or in person.”

If this be true of an argument on appeal, it is a thousand times more true of a hearing in the District Court where the protection of a fundamental right may hang in the balance and where a complete grasp of the facts and circumstances surrounding the cause for complaint may be essential to the court in arriving at a fair and just judgment.

The court has laid down three conditions that must be met (pp. 16-17):

- (1) “If it is apparent that the request of the prisoner to argue personally reflects something more than a mere desire to be freed temporarily of the confinement,
- (2) “that he is capable of conducting an intelligent and responsible argument,
- (3) “and that his presence in the courtroom may be secured without undue inconvenience or danger, the court would be justified in issuing the writ.”

(1)

The appellant is sixty-one years of age. He is suffering from arteriosclerosis which greatly interferes with the circulations in his hands and feet. To be taken anywhere in chains, even to wear them for only a few hours, is to invite the most excruciating torture from which it will take days to recover—an ordeal he would not contemplate undergoing if he did not think it essential to the ends of justice.

(2)

The appellant is a writer and scientist, with a well-trained analytical mind, and with an education that is rated the equivalent of a Ph.D. While he is unschooled in law and procedure, he is not totally unfamiliar with Legal History or legal reasoning. As a child he played in his Uncle's law office and was familiar with such names as Story, Church, Greenleaf, and Andrews before he had finished the third grade, and he had read everything they had written.

(3)

The writer has spent his entire adult life in prison, almost thirty-nine of those years in solitary confinement. He has preserved his sanity by devoting all of his spare time to study and creative mental activity. He is well convinced that he can put up an intelligent and well reasoned argument upon almost any subject under the sun, from the differentiation of *Salmonella Eartryke* to the classification of the *myxomyceteas* or

the structural relationships of the steroid hormones, vitamins, and carcinogenic substances. But he is totally unfamiliar with the mechanics of modern life. He knows exactly as much about driving a car or modern traffic regulations as a Berkenshire hog knows about the Quantum Theory or discontinuous differential equations. Left alone and unassisted on Market Street, he would probably starve to death before he could get to the other side. He wants to be free, but the only freedom he wants or would accept is that of carrying on his work under his own name and under more favorable conditions than prison can afford.

In one hundred years no case could be found fitting more perfectly into the Supreme Court's requirements.

CONCLUSION.

From the whole record and from the foregoing argument, it is obvious that Judge Goodman's action in this case is so arbitrary and capricious as to amount to a complete failure to perform the judicial duties of his high office, and his order should be reversed and the case remanded with directions defining the limits of the property rights claimed by the appellant, instructing the lower court on the procedure to be followed, and ordering the lower court to order the production in court of the appellant at all times when the Government is to be heard in this cause, since nothing less will meet the minimum requirements of

fairness the Supreme Court holds to be essential to due process of law. (*Price v. Johnston*, supra.)

Dated, Alcatraz, California,
October 16, 1950.

Respectfully submitted,

ROBERT STROUD, No. 594,

In Propria Persona.

No. 12,595

IN THE

United States Court of Appeals
For the Ninth Circuit

ROBERT STROUD,

Appellant,

VS.

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,

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FILED

MAY 19 1950

PAUL P. O'BRIEN,

CLERK

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No. 12,595

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ROBERT STROUD,

Appellant,

VS.

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

The method by which appellant (an inmate of the United States Penitentiary at Alcatraz, California) seeks to invoke the jurisdiction of the United States District Court for the Northern District of California, hereinafter called "the Court below", and the jurisdiction of this Honorable Court, to review the decision of the Court below denying appellant's petition for injunctive relief against the appellee, the Warden of the said penitentiary, is set forth in full in the said appellant's jurisdictional statement on page 2 of his opening brief.

STATEMENT OF THE CASE.

The appellant, an inmate of the United States Penitentiary at Alcatraz, California, filed a pleading which he entitled, "A PETITION FOR AN INJUNCTION RESTRAINING THE RESPONDENT, E. B. SWOPE, WARDEN, FROM UNLAWFUL INTERFERENCE WITH THE LAWFUL BUSINESS INTERESTS OF THE PETITIONER OR OF DEPRIVING THE PETITIONER OF PROPERTY RIGHTS SECURED TO HIM UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES, AND OTHER REDRESS" (Tr. 2). Thereupon the Court below entered the following "Order Denying Petition for Injunction":

"The petition for injunction is denied. Treating the petition as one for the writ of habeas corpus, it is denied and the proceeding is dismissed.

Dated: March 21, 1950.

/s/ LOUIS E. GOODMAN,
United States District Judge.

(Endorsed): Filed March 21, 1950."

(Tr. 48.) From this order appellant now appeals to this Honorable Court. (Tr. 49.)

QUESTION.

Is a prisoner incarcerated in a United States Penitentiary entitled to carry on his business affairs and engage in unrestricted correspondence in furtherance thereof?

CONTENTION OF APPELLEE.

The answer to the above stated question is: No.

ARGUMENT.

The application filed by the appellant to compel the appellee, E. B. Swope, Warden of the United States Penitentiary, Alcatraz, California, to allow him to carry on his business affairs and engage in unrestricted correspondence in furtherance thereof finds no sanction in the rules promulgated for the governance of inmates of penal institutions* in accordance with the provisions of Title 18 USCA, Section 4042, which reads as follows:

“The Bureau of Prisons, under the direction of the Attorney General, shall—

*Paragraph 2 of Section b at pages 2 and 3 of Manual Bulletin No. 96, dated February 23, 1944, issued by the Director of the Bureau of Prisons of the Department of Justice of the United States of America reads as follows:

“(2) Non-Relatives—

Ordinarily, inmate correspondence with friends, business associates, and other persons outside the family may be permitted whenever it does not appear that rehabilitation will adversely be affected or that it will be detrimental to the well-being of the inmate or his correspondent. Correspondence with business associates, of course, must be limited to social matters. *An inmate cannot be permitted to direct his business, no matter how legitimate it may be, while he is in prison.* But this does not go to the point of prohibiting correspondence necessary to enable the inmate to protect and husband the property and funds that were legitimately his at the time he entered the institution. Thus a prisoner could correspond about refinancing a mortgage on his home or sign insurance papers, but he could not operate a mortgage or insurance business while in the institution.”

(1) have charge of the management and regulation of all Federal penal and correctional institutions;

(2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;

(3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States.

This section shall not apply to military or naval penal or correctional institutions or the persons confined therein."

Certainly the actions of the Warden in denying appellant's requests are in no sense an abrogation of a personal right or a constitutional guaranty. Under such circumstances the remedy sought by the appellant will not lie.

See:

DeCloux v. Johnston, 70 Fed. Supp. 718;

Sanders v. Johnston (C.C.A. 9), 159 F. (2d) 74;

Numer v. Miller (C.C.A. 9), 165 F. (2d) 986;

Sanders v. Swope (C.C.A. 9), 176 F. (2d) 311,

and the authorities cited in these cases.

In the *Numer* case, attention is particularly called to the fact that it was conceded by the Warden that Numer was not permitted to take a correspondence course in English at the University of California,

while to certain other inmates this privilege was given. In this latter case the Court said:

“Patently there is nothing in this showing which would make out a case cognizable by the district courts. It is not their province to supervise prison discipline. *Platek v. Aderhold*, 5 Cir., 73 F. 2d 173. Congress has entrusted that responsibility to the Bureau of Prisons, set up in the Department of Justice. The controlling statute, 18 U.S.C.A. § 753a, provides, that the Bureau ‘shall have charge of the management and regulation of all Federal penal and correctional institutions and be responsible for the safe-keeping, care, protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States’ ”.

See, also:

Snow v. Roche (Judge), 143 F. (2d) 718, certiorari denied, 323 U.S. 788.

Furthermore, it is well settled that it is not the function of the Court to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined.

Sarshik v. Sanford (C.C.A. 5), 142 F. (2d) 676;

Platek v. Aderhold (C.C.A. 5), 73 F. (2d) 173, 175;

Kelly v. Dowd (C.C.A. 7), 140 F. (2d) 81, 83, certiorari denied, 320 U.S. 786.

See, also:

Hauck v. Hiatt, 50 Fed. Supp. 917;

Crites v. Hill, 9 Fed. Supp. 975.

Assuming, arguendo, that there is possible merit in the appellant's complaint, the action is one that should be filed against the appellee's superiors in the District of Columbia for it was they who promulgated the rules that the appellee of necessity, must carry out and is properly carrying out in relation to the activities of the appellant. That there has been no abuse of discretion by the prison authorities is clearly evidenced by the language of the petition itself.

But regardless of where and against whom the action will lie, mere practical consideration alone would reason against the granting to appellant of the relief for which he prays. It is clear such a precedent would open the door to a flood of applications from Federal prisoners and seriously hamper the administration of our prison system. The Court below refused to establish such a precedent. This Honorable Court is urged to do likewise.

CONCLUSION.

In view of the foregoing, it is respectfully submitted that the order of the Court below is correct and should be affirmed.

Dated, San Francisco, California,
December 6, 1950.

FRANK J. HENNESSY,
United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

Attorneys for Appellee.

No. 12,596

IN THE

United States Court of Appeals
For the Ninth Circuit

CHAN SHING HO, also known as Jack
Chan,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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FILED

OCT - 4 1950

PAUL P. O'BRIEN,

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No. 12,596

IN THE
United States Court of Appeals
For the Ninth Circuit

CHAN SHING Ho, also known as Jack
Chan,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

**A STATEMENT OF THE PLEADINGS AND FACTS DISCLOS-
ING THE BASIS UPON WHICH IT IS CONTENDED
THAT THE DISTRICT COURT HAD JURISDICTION AND
THAT THIS COURT HAS JURISDICTION TO REVIEW
THE JUDGMENT IN QUESTION.**

This is an appeal from a judgment against the ap-
pellant in the United States District Court for the
Northern District of California upon a verdict find-
ing the appellant guilty of violations of 26 U.S.C.A.
145 (b) (Income Tax Evasion). (R-1 p. 10.) The
charges are in one indictment containing four counts.
(R-1 p. 2.)

The first count charges that on or about the 15th
day of March, 1944 the defendant Chan Shing Ho,

also known as Jack Chan (and hereafter referred to by his American name) "did wilfully and knowingly attempt to defeat and evade a large part of the income and victory tax due and owing to the United States of America for the calendar year 1943, by filing and causing to be filed with the Collector of Internal Revenue for the first Internal Revenue Collection District of California at San Francisco, California, a false and fraudulent income and victory tax return wherein he stated that his net income for said calendar year, computed on the community property basis, was the sum of \$3,384.00 and that the income and victory tax due and owing thereon was the sum of \$429.93, whereas as he then and there well knew, his net income for the said calendar year, * * * was the sum of \$11,105.15, upon which said net income he owed the United States of America an income and victory tax of \$2,773.19."

The second count pleaded, in essentially the same language, the same offense for the year 1944, excepting that "victory tax" is deleted, a joint income tax return was filed, the declared net income alleged was \$3,903.22, the declared tax owing was \$327.73, whereas the claimed income was \$16,507.65 and the claimed income tax, \$4,513.51.

The third count was the same for the year 1945, as count two, excepting that a separate return was filed by the defendant, the declared net income alleged was \$5,305.63, the declared tax, \$611.41 and the claimed actual income was \$8,216.01 and the claimed tax, \$1,387.64.

The fourth count was the same for the year 1946, as count three, excepting that the declared net income alleged was \$6,849.09, the declared tax, \$766.46, the claimed actual income was \$16,582.30 and the claimed tax, \$3,876.36. (R-1 pp. 2-4.)

The verdict of the jury was guilty of all four counts. (R-1 p. 6.) The appellant was sentenced to imprisonment for a period of one year and one day and that he pay a fine to the United States in the sum of \$7,500.00 on count one; for imprisonment for one year and one day on count two; for imprisonment for one year and one day on count three; for imprisonment for one year and one day on count four; that the periods of imprisonment imposed on the defendant on counts 2, 3, and 4 commence and run concurrently with the period of imprisonment imposed on the defendant on count one. (R-1 pp. 8 and 10.)

The United States District Court for the Northern District of California had jurisdiction under the provisions of 26 U.S.C.A. Sec. 145 (b) and 18 U.S.C.A. Sec. 3231.

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under the provisions of

28 U.S.C.A., Sec. 1291.

Upon conclusion of the case of the prosecution, defendant moved the Court for a judgment of acquittal upon the grounds of the insufficiency of the evidence, principally, a failure to establish the *corpus delicti* save and except by extrajudicial admissions of the

defendant, and an improper application of the so-called "net worth-expenditure" method of proving income tax evasion. (R-2 p. 296, line 7.)

After the verdict and within the time allowed by law appellant moved the Court for a new trial upon all the grounds now urged on this appeal and others. (R-1 p. 7.) The motion was denied and appellant was sentenced as above stated. (R-1 p. 8.)

Thereafter appellant duly filed his notice of appeal from said judgment against him within the time prescribed by law. (R-1 p. 12.)

Thereafter, and within the time prescribed by law, appellant filed and served his designation of the record to be sent up on appeal (R-1 p. 15) and thereafter and within the time prescribed by law, appellant filed and served a statement of points upon which appellant intends to rely on appeal. (R-1 p. 16.)

Thereafter and within the time prescribed by law and by order of said United States District Court, the record in this case, including the transcript of all testimony and all exhibits separately and directly certified, was filed with the clerk of this Court together with a statement of points to be relied upon on appeal.

STATEMENT OF THE CASE, PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

As stated above, appellant was convicted of income tax evasion in wilfully and knowingly filing false and

fraudulent individual returns in each of the years 1943, 1944, 1945 and 1946.

THEORY OF THE PROSECUTION.

Appellant in all of said years, and for many years theretofore, had been the manager of a meat market known as the Palace Market at 816 J Street, Sacramento, California. Admittedly this was owned and operated by a business partnership consisting of 20-25 Chinese or Chinese-Americans, until the year 1941.

It was the contention of the prosecution that in 1941 a meeting of the partners had been held and at this meeting the partnership had been dissolved and that immediately thereafter appellant Jack Chan had bought all of his other partners out and thereafter had owned and operated the business as an individual.

It was the further claim of the prosecution that, after the alleged dissolution of said partnership, and the purchase of said partners' interests, appellant, for purposes of income tax evasion, continued to list his allegedly "former" partners, and their interests in his partnership returns for the years 1943, 1944, 1945 and 1946, paying income tax only on his own claimed share and wages.

To establish this theory, the prosecution relied entirely upon claimed extrajudicial admissions, all of which could be capsuled into a statement made by appellant to two special agents of the Internal Revenue Department that: "'41 all partners, everybody

dropped out of business" and "since 1941 business all mine" and "now business mostly mine".

The prosecution then prepared and presented "balance sheets" based upon the so-called "net worth-expenditures" method. These were offered in the following way:

(1) Special agent C. L. Englund first testified that the books and records of the appellant were inadequate because:

(a) they were in Chinese and the government's interpreter had said that he could not speak the particular dialect in which they were written, and also

(b) certain columns of figures did not have descriptive columnar heads and therefore the agent could not read them without explanation by the taxpayer.

(2) Special agent Englund then presented a balance sheet showing assets and liabilities as of January 1, 1943 (the beginning net worth) based entirely and in all essential details upon what he said the appellant had told him that his assets and liabilities were—and, of course, assuming that the business belonged entirely to appellant and that appellant's partners had no interest therein;

(3) In the same manner balance sheets for each of the years of the period 1943-1946 were "constructed";

(4) The agent then testified that appellant had told him that he had received no gifts and made no loans during the period, based upon which assumption the agent classified all increase in net worth as income;

(5) Another agent computed the tax, based upon all these assumptions;

(6) The assumptions, reduced to writing, were then circulated among the jury to be held by them and taken home and studied throughout a trial which lasted from Wednesday, April 5, 1950 to Thursday, April 20, 1950.

Upon the conclusion of plaintiff's case, defendant moved for a judgment of acquittal upon the grounds hereinabove noted (*supra*, p. 3). This motion was denied.

THEORY OF APPELLANT.

The evidence of appellant showed:

With reference to the dissolution of the partnership.

(1) That only two meetings of the partnership had been held, one on July 28, 1940, and the other October 20, 1940. Minutes of these meetings were introduced. No meeting was held in 1941. No negotiations or action was ever taken by the partners collectively, or any portion of them, or individually, to dissolve the partnership. In 1945-1946 appellant did buy out certain partners; and later completed the purchase of the other partners' interests.

(2) Four of the partners (all who were available), including Chan, testified there had been no dissolution, no purchase of their interests, excepting as disclosed by the partnership returns.

(3) Written agreements of purchase and sale of the partnership interests of two of the partners were introduced in evidence. These showed purchases in 1945 and 1946.

(4) Letters from partners were introduced showing they were still partners in 1947 and opening negotiations for the purchase of their shares.

(5) The following was shown with reference to the statement made by appellant to the agents, “ ’41 all partners, everybody dropped out of business”:

(a) That between 1939 and 1941 and principally in 1941 many of the working partners had in fact “dropped out of the business” in the sense that they had quit their employment with the Palace Market and opened businesses of their own;

(b) That when the partnership had commenced to make money, during the war, appellant, who had theretofore “carried the partnership over the lean years, commenced to overdraw his salary, “borrowing” without authorization from his partners and with this money he acquired the assets—a home and the store building—in his own name; these being the assets to which the prosecution pointed in support of its theory that there was unreported income. When questioned about this by the special agents appellant became “scared”.

(c) In several other places in the very same statement in which appellant had said “ ’41 all partners, everyone dropped out of business” he also said “in ’46 have ten partners” and similar statements.

(d) A few days after the sworn statement had been made and given to him for correction, appellant did correct it and wrote into the statement "1946, 10 partners J.C."

With reference to the claimed "inadequacy of the books" the defendant's evidence showed.

(1) That appellant kept a complete set of "single entry" books in which all items of receipts and disbursements were kept, partly in English and partly in Chinese;

(2) That there is only one Chinese written language irrespective of dialects;

(3) That translated summaries were offered to and received by the special agents;

(4) That he had all cancelled checks; every bank statement; all check stubs;

(5) That these books and records were complete for every day in the year during every year of this period;

(6) That appellant offered every possible cooperation throughout the investigation, submitted to 20 interviews, delivered all of the books and records to the agents, all the cancelled checks, bank statements, translated summaries, had an audit made and turned the audit and the work sheets over to the government.

As to the facts included in the "balance sheet" prepared by the special agents and based wholly upon what the agent said that appellant had said were his assets.

(1) The defendant showed that, of a total declared assets of \$27,937 as shown on the beginning net worth statement prepared by the prosecution and submitted to the jury, one item, \$22,009.50, was wholly fictitious, another \$1,000.00 for home furnishings was over-valued, \$3,600.00 of accounts receivable were omitted, \$12,758.24 of money owed by the partnership to the taxpayer was omitted, life insurance of a value of \$4,172.62 was omitted; that of \$28,700.00 of total liabilities stated, \$1,300.00 were liabilities of the partnership, and \$27,400.00 were obligations which the evidence (in large part written agreements) showed were not owed until 1945-1947;

(2) That in the balance sheets for the other years of the period the same mistakes were carried through the computations of the government agents;

(3) That instead of the large amount of unreported income as contended by the prosecution the total unreported did not exceed \$3,693.97;

(4) That there was no evidence whatever that the failure to report this amount was wilful but on the contrary, it was due to mistakes quite common in common tax accounting such as (a) the inclusion of partners' salaries as expenses of the business; (b) the listing of certain capital expenditures as repairs.

SPECIFICATION OF ERRORS.

The appellant makes the following specification of errors and states the following points upon which it intends to rely on the appeal:

“(1) That the trial Court erred in denying Appellant’s motion for a judgment of acquittal made at the conclusion of the Respondent’s evidence;

(2) That the verdict of the jury was contrary to the weight of the evidence;

(3) That the verdict of the jury was not supported by substantial evidence;

(4) That the court erred in denying the Appellant’s motion for a new trial;

(5) That the court erred in overruling objections by Appellant to questions addressed by Respondent’s attorneys to the witnesses C. L. Englund and Mrs. J. F. Devine, which questions related to extrajudicial admissions claimed to have been made by the Appellant and which were asked and answered without any proof (other than such purported admissions) that a crime had been permitted either before or after such questions were asked and answered.”

QUESTIONS PRESENTED IN THIS CASE.

(1) Was it necessary for the Government to prove the dissolution of the partnership in this case?

(2) If it was, is a phrase in a “sworn statement” made by the appellant in 1948 that “41 all partners,

everybody dropped out of business'' etc. proof of that fact where in the same statement he also said five times that there were still 10 partners in 1946 and where the facts showed that during the period the working partners ceased working for the business?

(3) Assuming that this is an "extra judicial admission does the prosecution sustain its burden of proof by introducing such statement, and similar oral statements alleged to have been made by the appellant to the agents without any corroborating proof of other facts whatever showing such dissolution?

(4) Assuming that such evidence is sufficient to establish a *prima facie* case, is the evidence sufficient to support a verdict where (a) the minute book of the corporation (b) the testimony of all partners (c) letters written by partners (d) written agreements of purchase and sale, all show that there *were no facts* from which a dissolution of a partnership could be found?

(5) May the prosecution prove a tax evasion case by balance sheets prepared by the "net worth-expenditures" theory, based entirely on claimed extra-judicial admissions of appellant, if the books of the appellant are available and "adequate"?

(6) Are such books inadequate and may they be disregarded and cast aside by the agents in favor of extra-judicial statements merely because they are (a) written in Chinese and (b) because one of the columns is not labeled but where the explanation of the figures was readily obtainable?

(7) Is a balance sheet showing beginning net worth in a case presented on the "net worth-expenditure" method where said balance sheet relies entirely upon extra-judicial admissions of the accused?

STATEMENT OF FACTS.

HISTORY OF APPELLANT AND ORIGIN OF PARTNERSHIP; CHANGES IN MEMBERSHIP; BUSINESS CONDUCTED.

The defendant Jack Chan was born in China. He came to this country in 1913. He is 61 years old, married and has eight children. His schooling was limited to four years in China, where he learned to speak some English (R-2 p. 303, lines 2-12.) When he arrived in this country he went to Sacramento and was a member of a partnership in a butcher shop, his partner being Wing Lee. This was in 1913. (R-2 p. 304, line 7 to p. 305, line 14.)

In 1923 he left this partnership and opened the Palace Market, a meat market, which is the business involved in this proceeding. The business at the outset was a partnership and there were twenty partners. Chan's original investment in this partnership business was \$2,000.00 which he obtained by selling out his interest to Wing Lee in the old partnership. The total capitalization of the partnership of the Palace Market was \$25,000.00. Thus Chan's interest was 20/250th. (R-2 p. 305, line 25 to p. 306, line 25; R-2 p. 317, line 1.)

There was a written partnership agreement dated September 8, 1923, which appears in evidence (Defendant's Exhibit F, R-2 p. 316, line 11) with its translation.

Twenty-five partners were named in the original partnership agreement and the interest of each is stated. Jack Chan, the appellant, is listed under his Chinese name, Chan Shing Ho. (He is also sometimes called Chan Jock Wei or Chan Jock Way.) (R-2 p. 310, line 7 to p. 314, line 18.)

During the period of the existence of the partnership some of the partners died. For example, Chin Wing died in 1932. When this occurred there was no formal dissolution of the business. Apparently by tacit understanding the son of the deceased partner inherited and succeeded to the interest of the father in the business. (R-2 p. 323, line 1.)

Certain new partners were added in 1927. These new men bought out the interests of original partners.

Chin Him succeeded to a part of the interest of his deceased father, Chin Wing, and a part was sold to others. The new partners' names were: Lowe Sun Ho, Chan Yon (incorrectly stated in the transcript as Chan Pon), Chan Lai, Chan Yuk and Chan Quong. There were then 24 partners. (R-2 p. 324, line 2 to p. 326, line 19.) Kong Chi Chan had withdrawn from the partnership and his share had been withdrawn from the capitalization, leaving a total capitalization of \$22,500.00. (Deft. Ex. translation; Minutes of Oct. 20, 1940 meeting.)

There were other changes in 1933 but the total number and amount of capitalization remained the same. (R-2 p. 327, line 11 to p. 328, line 3.)

The principal place of business during all of the years has been at the same location. Jack Chan was the original manager and has remained the manager during all of the years, excepting for a short period of time when he was in China.

Some of the partners were working partners employed in the meat market and some were not; this was true all throughout the transaction of business until 1946. (R-2 p. 318, lines 7-21.)

The partners resided in various places; some in Sacramento, some in China, some in Portland, some in Los Angeles, and some in San Francisco. (R-2 p. 318, line 23 to p. 319, line 10.)

Originally the partnership operated only the one business at 816 J Street. Later it expanded, opening stores at 19th and Broadway, Sacramento, where one of the partners, Henry Chan, was manager (until 1939 when he left the employ of the partnership), at 31st and Alhambra Boulevard in Sacramento, operated by George Chan, another partner, a part of the time, and at 1920 Del Paso Boulevard, North Sacramento, managed by George Quock, son of one of the partners. None of these branch markets is still in existence, nor were any of them in existence during the period involved in this action. During 1943-1946 the Palace Market at 816 J Street was the only store. (R-2 p. 319, line 14 to p. 322, line 11.)

CHAN'S TRIP TO CHINA; MANAGEMENT OF STORE; FINANCIAL CONDITION; MEETINGS OF MEMBERS OF PARTNERSHIP JULY 28, 1940 AND OCTOBER 20, 1940.

Appellant Jack Chan went to China in 1940 to bring home a new wife. (R. 2, p. 328, lines 15-19.) While he was away George Chan, one of the partners, took charge of the business. Lila Chan, now Lila Lowe, one of Chan's daughters was to sign checks with George Chan. (R. 2, p. 329, line 3.)

While Jack Chan was away, there was a meeting of the membership of the partnership. It was held on July 28, 1940 at the Palace Market. After the return of appellant from China another meeting was called and held October 20, 1940.

Since the case of the prosecution is predicated upon a claimed termination of the partnership (said to have been held in 1941—but no meetings other than the two above were ever held) we shall digest rather fully the business of these two meetings.

Both meetings were held at the Palace Market, 816 J Street. The meeting of July 28, 1940 was attended by the following partners: Chan Him (son of Chin Wing who had died); Lowe Jin, Young Poy Kee (Harry Young), Chan Tin Kuei (George Chan), Chan Tin Foo (Henry Chan) and Kwok Bing Wah, who was the son of Foo Chong who was in China. The minutes show that of the total of \$22,500.00 in shares, \$15,900.00 were represented. The report of the book-keeper showed that the partnership was indebted for back bills, back rentals and back wages. George Chan reported that in Jack Chan's absence he had been

delegated to investigate the accounts, had found the partnership in great debt and he had therefore called this meeting. The following resolutions among others were adopted:

(a) George Chan was to manage the main store, Chan Yee King was to manage the North Sacramento store.

(b) When Jack Chan returned another meeting was to be called and the accounts were to be reviewed and

(c) He would then be reappointed manager in order that the partnership could be aided by his experience apparently in composing the partnership debts.

(Defendant's Exhibit H, Translation.)

When appellant returned from China the meeting promised above was actually held on October 20, 1940. The partners present were: Chan Him, Lai Ching Low, George Chan, Henry Chan, Jack Chan, Harry Young, Kwok Bing Wah (representing Foo Chong) and several others.

Of the total of \$22,500.00 shares, \$19,300.00 was represented.

George Chan reported that the indebtedness of the partnership was then \$20,500.00 and that the creditors' demands were urgent.

By resolution Jack Chan was made general manager of the store and was delegated to attempt to pacify the creditors of the business. Resolutions were

also passed requiring countersignatures of checks at the bank, calling for annual partnership meetings (which were never called or held) and for annual financial statements (which were never issued). (Defendant's Exhibit H, translation; R-2 p. 357, line 12 to p. 363, line 25.)

These two meetings are the only meetings of the partnership which have ever been held. (R-2 p. 357, line 3.) After the meeting appellant continued to manage the store. For a time two partners actually signed checks; later Jack Chan resumed the practice of signing checks alone.

As to all of the foregoing facts about the partnership, its origin, management, personnel and existence, there is not the slightest conflict in the record whatever. There is no evidence whatever of any meeting of the partnership in 1941 and no evidence of any collective action of the partners dissolving the partnership.

The minute book of the partnership is in evidence. (Defendant's Exhibit "H".) It is written in Chinese. There is ample blank space for the recordation of any minutes other than those recorded had such meetings in fact been held. The evidence of all of the witnesses is that no meetings were ever held.

THE FACTS RELATING TO THE AFFAIRS OF THE PARTNERSHIP AFTER CHAN'S RETURN AND AFTER THE TWO MEETINGS (OTHER THAN THE CLAIMED EXTRA-JUDICIAL ADMISSIONS).

The history of the partnership after his return from China and the holding of the meeting of October 20, 1940 was related by appellant, who was called as the first witness for defendant, and his testimony was supported by other witnesses and documentary evidence. There is no contradiction of the testimony which follows:

Between 1939 and 1943 appellant continued to run the business as before but some of the working partners quit the employ of the partnership. (R-2 p. 366, lines 9-19.) When they quit working for the partnership, *nothing whatever was said about their drawing down their interest in the partnership.* (R-2 p. 366, lines 20-24.)

The first partner to make any overtures about drawing down his interest in the partnership was George Chan. In 1945 George Chan asked appellant to buy him out and had his lawyer, Nelson French, draw an agreement which is in writing and is in evidence in this case. (R-2 p. 367, lines 1-20; Defendant's Exhibit "Z".) The cancelled check with which this interest was paid is in evidence. (Defendant's Exhibit "I"; R-2 p. 367, line 18 to p. 368, line 9.)

George Quok left the employ of the partnership in 1941. He was the son of Foo Chong, a partner. At the time that George Quok left the employ of the partnership nothing was said about his drawing out

his father's interest in the partnership. (R-2 p. 368, lines 12-22.) The father, Foo Chong, was then in China. He died there in 1942 or 1943. (R-3 p. 826, line 21 to p. 827, line 7.) Nothing was done about buying out the "Quok" interest in the partnership until 1946. At that time it was agreed that the interest would be repaid in two payments, of \$1,300 each and these payments were made by two checks payable to Quok Brothers, one dated April 8, 1946, the other May 8, 1946. (Two other partners, Ling Chong with an interest of \$500.00 and Chung Pon with an interest of \$100.00 were bought out in the same transaction; they were indebted to Quok Brothers and the amount was paid to them and included in the payment of \$2,600.00.) (R-2 p. 368, line 25 to p. 371, line 25.)

Purchase of the Foo Chong interest as thus testified to by appellant was confirmed by a written agreement dated April 4, 1946, in Chinese, translation of which is attached (Defendant's Exhibit "Q"), "I am yielding the entirety of this share (\$2,600.00) to be bought by Chan Jock Wei (Jack Chan). After April 8, 1946, any profits or losses of the business will be shared or borne by Chan Jock Wei and have no connection with the former shareholder." It was provided that payment was to be made in two installments of \$1,300.00 each.

The next partner to be bought out was Harry Young (Young Poi Gay, Young Poi Kay). He left the employ of the partnership in 1942 and opened up his own business. At this time back wages were owed to him which were paid back in 1944. Nothing was

said about buying out his partnership interest. (R-2 p. 372, line 19 to p. 373, line 23.) In 1947 Harry Young wrote Chan a letter. (Deft's Exhibit "K".) The letter is dated January 11, 1947.

In this letter Harry Young states:

"Time passes swiftly. In a twinkling of an eye, a new year had arrived. Only but the new year brings happiness to you and your business is prosperous I shall be consoled. I have a request to make. Long time ago you and I formed the Palace Market at 816 J Street, Sacramento, California. It has been over twenty years to this date. *I have a share of \$500.00 American money. I am planning to go into another line of business and am willing to have my share in the business withdrawn. Please have my share of \$500.00 returned to me as soon as possible to clear all procedures.** After my withdrawal, any profits or losses, duties or liabilities of the company would have no more connection with me. This is a notification to avoid any future dealings.

This is my request to you. I wish you the happiness of the new year."

(Deft's Exhibit "K" translation.)

When appellant received this letter he sent Harry Young a check for \$500.00. This cancelled check is in evidence. It is dated February 14, 1947. (Deft's Exhibit "L".)

Another partner bought out was Henry Chan. He quit the employ of the partnership in 1939, at which

*Throughout this brief all emphasis ours.

time according to Jack Chan there was nothing said about his withdrawing his interest in the partnership. Appellant testified that the first discussion with Henry Chan about withdrawing from the partnership was in 1946 when Henry Chan stated that he wanted to withdraw his interest. Henry Chan has not yet been paid. (R-2 p. 378, line 2 to p. 380, line 1.)

As a part of his effort to bring all of the facts before the Court and jury, since the government who had subpoenaed Henry Chan had not called him or any of the partners, he was called as a witness for the defense. He was a most reluctant witness with a failing memory. However, we did succeed in dragging out of him that his "first conversation" with appellant about withdrawing his interest from the partnership was "when I first heard that he (Jack Chan) was making some money—*sometime after the war started*". During this conversation, which was very casual, he asked for his interest in the partnership. He doesn't remember Chan's reply but Chan didn't tell him he would pay him. (R-3 p. 790, line 5 to p. 794, line 17.)

Those being all of the facts which could be elicited from the witness on a direct examination, the prosecution (following the pattern set by the special agents in their investigation) sought to coax legal conclusions from the witness that he definitely understood when he withdrew from employment that he was withdrawing from the partnership. (R-3 p. 800, line 22 to p. 801, line 6.)

Of course it was an impossibility for this partner to have had that understanding at that time. The witness, who had left the employ of the partnership in 1939 had been present at both of the partnership meetings in July and October, 1940. He first denied this *but later admitted his signature and presence at the meeting*. He could not remember anything that happened at this meeting but the minutes show his presence. (R-3 p. 802, line 19 to p. 803, line 3.)

In the minutes Henry Chan is called by his Chinese name, Chan Tin Foo. (R-3 p. 803, line 3.) He voted for all the resolutions at the July meeting, retaining George Chan as manager providing for a better control of the bank account, reappointing Chan as manager, considering wages, etc. At the October meeting after Chan's return, he also voted in favor of all the resolutions, appointing Jack Chan manager, approving his delegation to deal with creditors, providing for counter signatures on checks, etc. (Deft's Exhibit "H" transaction.)

Obviously, if he had considered himself out of the partnership in 1939 when he left its employ, we would not have found him actively participating in the partnership meetings of July and October 1940 as a partner.

The next partner, the termination of whose interest was discussed was Chin Wing. Chin Wing was Jack Chan's uncle. He died in 1928. Following the custom of this Chinese partnership, however, his widow and son "inherited" his interest. The son was Chin Him.

And it is Chin Him who is listed in all of the partnership returns as the partner (i.e. until the interest had been bought out). (See Plaintiff's Exhibits 5, 6, 7, and 8.) In 1946 Mrs. Chin Wing came to see appellant, and he agreed to buy her out. The consideration was \$2,000.00. However, again the following other partners: Chin Lai, Fong Wong, Chin Yok and Fung Chung, were indebted to the Wing family, and Mrs. Chin Wing claimed the right to their share. A check was issued for \$4,800.00 covering all these interests. It is defendant's Exhibit "M" dated June 5, 1946. (R-2 p. 380, line 4 to p. 384.)

The rest of the partners who were paid off by appellant were paid off by the cancellation of indebtedness owing by them to Chan. (R-2 p. 385, line 13 to p. 386, line 5.)

After the testimony of Jack Chan, the defendant also produced as witnesses, the other partners who were available. These men had all been subpoenaed by the prosecution. Reliance by the prosecution on the extra judicial statements of the appellant was not a matter of necessity. The government could have called these witnesses. Since it failed to do so, and in an effort to get all of the facts into the open, the defendant produced the following partners and their testimony.

He produced as a witness Lai Ching Low, a San Francisco merchant, a member of the San Francisco firm of Hip Hing Company (R-2 p. 445, line 14) and a member of the Palace Market partnership. (R-2 p.

435, line 7.) He was one of the original partners, his capital share being \$500.00. He was not a working partner. He attended the meeting of the partnership held in October, 1940. He confirmed the facts above stated as to the business transacted at this meeting. He affirmed that at this meeting there had been no mention of dissolution of the partnership, nor had this subject ever been discussed with him and that the first mention of his leaving the partnership had been in 1947 when he told Chan that he wanted to terminate his interest as a partner and when his interest was bought out by Chan. (R-2 p. 435, line 4 to p. 440, line 8.) On cross-examination, the witness stated that he had never been advised of the capital net gain of the business and that he intended to demand an accounting from appellant. (R-2 p. 440, line 13 to p. 444, line 20.)

Appellant also produced as a witness George Chan, one of the partners.

He had first entered the employ of the partnership in 1924, and from one to five years thereafter had become one of the partners. When the appellant Jack Chan went to China in 1940, he was the acting manager of the partnership. He was present at the meeting of October 20, 1940, when Chan returned.

He reaffirmed that at this meeting appellant was reappointed the manager of the partnership. No mention was made at this meeting of any dissolution of the copartnership. After the meeting George Chan remained in the employ of the partnership for from five

to six months. He quit such employment to go into business for himself. At the time of his leaving the employ of the partnership nothing was said about his terminating his interest as a partner.

(R-3 p. 803, line 23 to p. 808.)

He then testified that he had gone to a Sacramento attorney Mr. Nelson French in March of 1945 and had had him handle the negotiations for and draw the agreement terminating his interest in the partnership, Mr. Jack Chan buying him out and paying \$500.00 for his interest. (R-3 p. 808, line 11 to p. 812, line 3.)

This agreement is in writing and is in evidence as the Defendant's exhibit "Z". It states in part:

"For and in consideration of the sum of \$500.00 to me in hand paid, the receipt of which is hereby acknowledged, I hereby sell, assign, transfer and set over unto Jack Chan all of my right, title and interest in and to that certain partnership which conducts in various branches a butcher business. (There follows a description of the business which were then or had formerly been operated)" * * *

"* * * I hereby acknowledge receipt from Jack Chan of full settlement of all sums or other things due to me from him from the beginning of the world to the date of these presents." (Defts. Exh. "Z".)

On cross-examination it was sought to have the witness testify that he had actually terminated his interest in the partnership earlier. The following was the net result of this attempt:

“Q. Well, didn’t you think that you didn’t have any interest in those businesses?

A. I never gave it a thought.

Q. Never gave it a thought. You never got any profits from any of them?

A. Never did.

Q. And you never got any profit from the Palace Market either, did you?

A. Never did.

Q. And you know, as a matter of fact, that your interest in the Palace Market, whatever interest you had, terminated in 1941, isn’t that right?

A. Never terminated. * * *

Q. I will ask you if Mr. Chan didn’t agree to pay you back \$500 which you had put in the business?

A. We never talked about that.

Q. You never talked about that. And wasn’t it agreed between you and Chan that in 1941 that you dropped out of the partnership, and you terminated—‘I call it terminated’ in 1941 isn’t that true? Isn’t that what happened?

A. I quit work there that’s all.

Q. But didn’t you terminate all your interest in the partnership as of 1941?

A. No——”

(R-3 p. 816, line 1 to p. 817, line 2.)

The prosecution then sought to impeach Mr. Chan by showing that he had made a statement in writing to special agent C. L. Englund. This statement was typical of the statements taken by this special agent in that he sought to elicit, and did elicit, not facts, but

conclusions of law. The questions and answers were as follows:

“* * * as far as you are concerned, you dropped out of the partnership in 1941, is that correct?

A. I call it terminated then.”

(R-3 p. 820, lines 13-25.)

“How long were you a partner at the Palace Market?

A. From '27 to '41.”

These of course are conclusions of law. No effort was made by the agents to obtain *the facts*.

However, it is very possible that when the witness had quit the employ of the partnership he had considered that his interest in the partnership terminated by the very fact of termination of employment.

Such, of course, is not the legal consequence of termination of employment.

Had the agents been sufficiently interested they would have sought to elicit facts—rather than conclusions—they would have asked for conversations between the partners, and for written evidence and they would have learned that when George Chan had quit his employment he never so much as said a word about his partnership interest terminating, never gave it a thought (R-3 p. 816, line 2) and that when he went to his lawyer he was advised that he did have an interest in the partnership. “That is what the lawyer said” (R-3 p. 814, line 2), and it was then in March 1945 that he had an agreement in writing drawn under which appellant bought him out.

The next witness was Henry T. Chan, upon whose testimony we have already commented.

Also as we have demonstrated above the defendant in an effort to get all of the facts before the jury, produced and translated the minutes of the two meetings. (Supra p. 7.)

The following other evidence was introduced to corroborate the testimony that the partnership was still in existence during the period from 1943-1946.

A letter from another partner Chan Sheu Chun dated November 3, 1947 asks for money and says "I am willing to have my share book put in your hands and withdraw the share from the store."

An examination of the partnership returns will show that as each partner's interest was bought out, as shown by the above testimony, that partner's name was dropped from the list of partners named in each return.

Thus appellant's testimony was confirmed by the other partners themselves, corroborated by written agreements, by cancelled checks, by all of the evidence save and excepting only the conclusions of law contained in statements taken by the agents.

The prosecution called as its witness on rebuttal* Harry K. Young. He testified that he had been a partner commencing in the 1920s. He had also been employed by the partnership. He had been present

*Although subpoenaed by the prosecution and present at the outset of the trial he had not been called.

at the meeting on October 20, 1940. At this meeting nothing was said about getting rid of the partnership. (He thought that the meeting he had been present at had been in 1941.) At the meeting it was decided "to put Mr. Chan on his present job." Nothing was said in 1941 about buying out his interest in the partnership. After 1941 he didn't have anything more to do with the market. In 1947, he had a friend write for him the letter which is Defendant's Exhibit "K". (R-3 pp. 830-841.)

Again the prosecution sought to impeach the witness by showing that he previously had stated, or the special agents had said that he had stated conclusions that he was out of the partnership after 1941.

GOVERNMENT'S EVIDENCE AS TO THE DISSOLUTION OF THE PARTNERSHIP.

The prosecution's whole case was built up on the proposition that a meeting of the partnership was called and held sometime in 1941 at which the partnership was dissolved—not that one or two partners dropped out of the partnership, but that it was wholly and completely dissolved and that Jack Chan during the years 1943, 1944, 1945 and 1946 was the sole owner thereof.

The prosecution relied entirely upon the testimony of two special agents of the Internal Revenue Department, C. L. Englund and Mrs. J. F. Devine, who testified to the following "admissions" of appellant:

“Q. Did he tell you what the nature of the business association had been?

A. He did.

Q. What did he say?

A. He said it was a former Chinese partnership.

Q. And these were former partners?

A. That is correct.

Q. What information did he give——

The Court. Q. First, did he give you information as to when they were partners?

A. He did, yes sir.

Q. When did he say they had been partners?

A. They had been partners since the early thirties, early 1930s.

Q. Did he tell you when the partnership was dissolved?

A. Yes sir.

Q. When did he say it was discontinued?

A. He stated it was discontinued in 1941.

Mr. Johnston. In that connection, Mr. Englund, you obtained a statement under oath from Mr. Chan, did you not?

A. I did.

Mr. Johnston. And if the court please we intend to introduce that a little later in Mr. Englund's testimony.”

(R-2 p. 99, line 10 to p. 100, line 7.)

* * * * *

“Q. Mr. Englund, under what circumstances did you converse with the defendant as to this prior partnership? Was the conversation entirely under oath, or did you have some conversations which were not under oath and some that were?

A. We had one statement that was under oath and several statements that were not under oath.

Q. Did you discuss this matter with him on the occasions to which you have previously testified he was not under oath, is that correct?

A. That is correct.

* * * * *

Q. Can you identify the dates on which you had discussions about the partnership?

A. I think so. You mean in regards to the partnership.

The Court. In regards to the partnership.

A. Yes sir, on July 23, 1947, we had a conference with Mr. Jack Chan in Room 270 in the Federal Building, Sacramento. * * *

Q. Who was present, Mr. Englund?

A. There was former revenue agent Edward Riordan, Jack Chan and myself. * * *

Q. Now on what other dates did you have conversation with respect to the existence of a partnership?

A. On December 19, 1948 at which time we took a sworn statement from Jack Chan under oath?*

Q. Where was that?

A. In Room 276 Federal Building, Sacramento.

Q. Who was present?

A. Mrs. J. Devine, Mrs. Rhodes, Mr. Chan and myself.

Q. Did you have any other discussions——

A. Yes sir.

Q. When was that?

A. On August 4, 1947.

Q. And where?

A. That was at 816 J St.

*The witness has confused the date, it was January 19, 1948.
(See R-2 p. 134, line 2.)

Q. And who was present?

A. Jack Chan and myself.

Q. Was there any other conversation——

A. We had several conversations throughout this period with Mr. Chan and occasionally the partnership was brought up.

Q. Do you recall the exact dates of those conferences now, Mr. Englund?

A. No sir, I don't."

(R-2 p. 100, line 18 to p. 104, line 2.)

* * * * *

"Mr. Johnston. Q. Now, Mr. Englund, you testified that at one time you questioned Mr. Chan under oath and that the record was made of his testimony on that occasion, is that correct?

A. That is correct.

Q. Do you have an original copy of the transcript that was made at that time?

A. I do.

Q. Will you tell us the date that the statement was taken?

A. January 19, 1948."

(R-2 p. 133, line 18 to p. 134, line 2.)

This sworn statement will be considered hereinafter. First, we will dispose of all the so-called oral statements which the agents say that Chan made.

The following further testimony was given by the witness C. L. Englund:

"Mr. Johnston. * * * Did you ever discuss that matter with Mr. Chan on any other occasion than when the formal statement was taken?

A. Yes sir.

Q. Do you recall when that statement took place?

A. It was sometime in January. I believe it was the 5th of January.

Q. What year?

A. 1948.

Q. Do you remember who was present?

A. That one particular conference was a preliminary conference and I don't believe anyone was present there.

Q. Except you and Mr. Chan?

A. That is correct.

Q. What was said on that particular occasion as to the existence or dissolution of the partnership——

A. On January 5, 1948 when discussing the building Mr. Chan had purchased in 1948 we asked him if that was his building. We said we noticed the building was purchased from funds on the Palace Meat Market account in the Capital National Bank. We asked him if that was correct and he said yes, that was correct, that he drew the funds on that account. We asked him if that was a partnership account. He said no, it wasn't a partnership account, it was his account. We asked him then if anyone had an equity in the Palace Market. He said no, 'business all mine since 1941.'

We also asked him if any of the assets appearing on the balance sheet we had compiled were partnership assets. He said no they were all his assets."

(R-2 p. 144, line 14 to p. 146, line 1.)

One of the partners was a man named Chin Wing. He was one of the original partners and he was Jack Chan's uncle. His son is Chin Him and Chin Him took his place in the partnership when the father Ching Wing died in 1928 (R-2 p. 324, line 14 to p. 325, line 5; R-2 p. 380, line 5.) All of this information was available to the treasury department agents. Nevertheless Mr. Englund testified as follows:

“Q. What did Mr. Chan tell you about Chin Wing's relationship to the business?

A. Chan stated that that check (a check drawn June 5, 1946 cashed by Mrs. Chin Wing) represented a payment that he had made to Chin Wing, Chin Wing had been a former partner of his—was a partner with him in about 1923 and Mr. Chin Wing dropped out of the partnership in about 1932, that he had paid his liability to Chin Wing in 1946 with that check.”

(R-2 p. 146, line 24 to p. 147, line 5.)

Chin Wing had indeed “dropped out” of the partnership in 1932. He had died. But Mr. Englund either failed to ascertain, or preferred not to reveal, that as was customary in this Chinese partnership the son, Chin Him took his place—was listed as a partner in all of the partnership returns during this period. (See Partnership Returns for 1943, 1944, 1945 and 1946, Plaintiff's Exhibits 5, 6, 7 and 8.) And when Mrs. Chin Wing was paid off she was paid off not only for herself but for several other partners in 1946. (R-2 p. 380, line 5 to p. 383, line 10.)

Excepting for the "sworn statement" these were the only statements which any agent of the government produced as to what Mr. Chan is supposed to have said.

Mr. Edward Riordan, the government agent who had been present during one of the alleged conversations, was not produced by the government as a witness.

Mrs. J. F. Devine, the second of the special agents of the Internal Revenue Department who participated in the investigation, and a witness for the prosecution, testified (regarding a conference with appellants December 3, 1947):

"Q. Now, at the time of that meeting did Mr. Chan make any statement to you or in your presence as to the history of the ownership of the Palace Market?

A. Yes, he did.

Q. What did he say at that time?

A. He said that the market, three partners, were in it originally in 1923.

The Court. How many?

A. Three. In 1927 it was reorganized and there were twenty-five partners. In 1932 there was again a change of partners—some dropped out and new ones came in, and there were various changes of partners, until they dropped out in 1941.

Q. * * * Was there anything said by Mr. Chan on that occasion with respect to the management of the partnership business?

A. Yes, sir. He said that he was the manager, he was the boss man, no one had anything to say

about it; that he alone could sign checks, except for the two months that he was in China.

Q. Now was anything else said by Mr. Chan on that occasion with respect to the history of this business organization, or its management?

A. Yes, that only the original investments were repaid. At no time were the profits divided, and that these partners—so-called partners—he didn't say that, his conversation was the partners that worked in the store received salary. Those who did not or were silent partners, they didn't receive anything except their original investment *when they withdrew from the partnership.**

* * * * *

A. * * * we talked about Chin Wing, who came into the partnership in 1923. He invested \$5,000.00 and 1932 he left the partnership. Sometime thereafter \$200.00 was repaid, and then in 1946 * * * Mr. Chan repaid *Mr. Wing's widow* \$4800 for the amount he invested in 1923, although Mr. Wing was not a partner in 1932. So that he still called him partners, even after they dropped out, and they had no interest in the business.

Q. Did Mr. Chan say anything else about the operations of the partnership?

A. He just insisted very emphatically that there was never any division of profits; that the partners didn't receive anything and he paid them back, he just paid the original investment."

(R-2 p. 227, line 2 to p. 228, line 24.)

The witness then testified about presentation of net worth figures and her presence when the so-called "sworn statement" was taken.

*This is quite true. And ALL the evidence showed that this was paid in 1945, 1946 and 1947.

THE SWORN STATEMENT.

On January 19, 1948, after twenty-some conferences the Special Agents placed Mr. Chan under oath (without benefit of counsel of course) and he was subjected to examination for several hours. The record of this statement is a transcription prepared by Mrs. Rhodes. Excepting that we believe she used 1932 instead of 1942, obviously intended in one place, we believe the transcription is substantially correct. It was introduced as Plaintiff's Exhibit 40. The Court will undoubtedly wish to read it in full. Pertinent excerpts are as follows:

"Q. Was their (i.e. the partner's) original investment paid back to them when they terminated, *when they left the partnership?*"*

A. I pay them.

Q. Did you pay them back by check or cash?

A. Mostly by check, some by cash——

Q. If they (the silent partners) left the partnership, did they receive their original investment back?

A. Yes——

Devine. There were twenty-five partners in 1945 and there were ten in 1946?

A. Yes, mam.

Devine. Here I have the name of fifteen partners that were partners in 1945, but were not shown as partners in 1946. I'll go down the list and will you tell me how much you paid each one when he left the business in 1945? The first one is Chin Ling. How much did you pay him when he left the business?

*Since the partners were paid in 1945, 1946, 1947 this is tantamount to a statement these partners left the partnership then.

A. I can't remember. I think probably about \$2,000.00. I can't remember——

Q. Were all these partners in 1945 (pointing to partnership return for the year 1945)——

Were they members of the partnership in 1945?

A. Yes.

Q. Let's see, you have Chin Ling listed. Was he a member of the partnership in 1945?

A. Yes.

Q. Was he a partner in 1946?

A. 1946 no. 1940 I went back to China and then '41 all partners everybody dropped out of business. Nobody wanted to stay in business. Too many bills, and then I take them all. I told partners I will pay everybody. I was working hard. I told creditor we pay month by month and year by year and pay everybody. Partners don't want in. I give money back. I pay everyone back for the partner capital. Somebody dropped so I pay back cash. I been here about thirty years and I don't want to owe anyone. I pay them back because I don't owe one penny. My wife, my whole family work. Everyone, in other words, *now the business mostly mine*. Stay or let them go."

(There follows a statement regarding the repayment back of the capital investment. Then the following was said):

"Q. How many shares did Low Chiang have?

A. He had five shares.

Q. *Is he still a member of the partnership?*

A. No.

Q. *Do you remember when he left?*

A. '46. * * *"

(Pltfs. Exhibit 40.)

Several days after he made this statement Mr. Chan was asked to correct it. He doesn't read English very well, but he does read. On page 8, in exactly the same place where on page 9 he had said: "'41 all partners everybody dropped out of business" he wrote in ink, "*1946 10 partners J.C.*"

The Court in reading the transcript of this statement will note the singular failure of the special agents to ask for any FACTS as distinguished from conclusions showing that there had been a dissolution of the partnership. On cross-examination of Mr. Englund, we tried to elicit some information about such facts:

"Q. * * * you knew, did you not, that in approximately 1941 the working partners ceased to work for the partnership; isn't that correct? You knew that, didn't you?

A. I believe Jack Chan stated that, yes.

Q. And isn't it what he told you, Mr. Englund, that the working partners had in 1941 ceased to work for the partnership? Isn't that what he told you on January 5, 1948?

A. That among other things. He elaborated on that fact.

Q. Isn't that——

The Court. Q. Go ahead and give the elaboration.

A. He stated that not all the partners worked for the partnership in 1941, that some of them were living in China, some were dead during the period and were still being carried on the books and records as partners. He said there were equities in the partnership as represented by their families.

Q. And he told you that the working partners had quit working in 1941, didn't he?

The Court. Q. I understood you to say in the conversation of January 5, 1948, he said that all the assets of the market belonged to him?

A. That is correct, yes, sir.

Q. And I understood you to say also that they all belonged to him since a certain date?

A. No, he said in 1941 all the partners dropped out of the business.

Q. I think you went further than that on direct and said that all of the assets and deposits of the Palace Market were his since 1941.

A. That is with respect to the assets we have here, because those are the only accretions that took place during the period, what he acquired himself on this balance sheet.

Q. Of course, we want to know from you, as definitely as you can recall, what he said about the ownership of the assets of the Palace Market and when that ownership started.

A. I believe he said that the Palace Market as such started in 1923 and was reorganized again and started in 1927, and in 1941 the business was heavily in debt and that they had a meeting and they decided that everybody drop out of the business, and he say, 'I take it all.' He is probably referring to these assets——

Mr. Pierce. Now, just a minute——

The Court. We just want the conversation. He said, 'I take it all'?

A. That is right."

(R-2 p. 205, line 1 to p. 206, line 18.)

The assets to which Mr. Englund is referring are the assets acquired AFTER 1943, the assets which appellant admittedly took in his own name and with funds taken from the partnership.

The foregoing is all of the evidence which the prosecution offered to prove its contention, which in his opening statement the U. S. Attorney, Mr. Seawell, had stated the government would prove: that a meeting of the partnership had been held in 1941 at which the partnership had been dissolved.

Objection was made to the introduction of all of this testimony. Before any conversations with the defendant were related we made this objection:

“Mr. Pierce. Just a moment, please, may it please the court, I wish to object at this time to the introduction of any conversation between this defendant and the witness. I object upon the ground that the only purpose for which a conversation of a defendant in an action such as this may be introduced is for the purpose of showing an admission, and that admission may not be shown in an action of this kind until the corpus delicti has been established.

In support of my objection would like to refer the Court to the case of the People v. DeMartini, 50 California Appellate 109, which contains a very full explanation of the well-settled common law rule in that respect, and that the common law rule is the rule applicable to Federal courts I believe is also well accepted under circumstances of this kind.

The Court. Overruled.”

(R-2 p. 48, line 19 to p. 49, line 8.)

When similar questions were later asked:

“Mr. Pierce. Objected to on the same ground as heretofore stated. May it be stipulated, your Honor, so I won’t be constantly interrupting——

The Court. That is right. Overruled.

Mr. Pierce. The same objection may go to all of the questions concerning the conversation between the defendant and this witness?

The Court. Yes. Proceed.”

(R-2 p. 55, lines 9-16.)

Upon the conclusion of the case of the prosecution, the defendant moved the Court for a judgment of acquittal upon the ground (among others) that the respondent had not sustained its burden of proof, that the sole evidence of the dissolution of the partnership was the claimed extra judicial statements of the appellant, that this fact was the fact upon which the guilt or innocence of the appellant hinged, and the only fact upon which a case could be made at all, and that the *corpus delicti* had theretofore not been established.

This motion was also denied.

APPELLANT’S BOOKS AND RECORDS AND METHOD OF BOOKKEEPING.

During the years 1943-1946 the Palace Market was engaged exclusively in the meat business. There were some charge accounts but most of the sales were cash.

When a purchase was made at the store, the money was rung up in the cash register. (R-2 p. 412.)

There was no tape on the cash register but readings could be taken of the totals. When purchases were made there was a spindle on which the invoices were impaled. Large purchases were made by check, small purchases were sometimes made in cash, which was taken out of the cash register. (R-2 pp. 413-415.)

When a charge sale was made, three copies of the sales tag were made, one of which went to the customer and two of which were kept by the market. The latter two were put on the spindle and at the end of the day, in a customer's file.

When the customer paid his bill the money was put in the cash register, but not rung up. The customer's bill was receipted and the entry was made at night in the daily record hereinafter noted. (R-3 pp. 679-681; R-2. pp. 415-417.)

All money that was received at the end of the day was counted twice when taken from the cash register, went into the safe and the next day it all went into the bank. (R-2 p. 417; R-3 p. 588.)

There were three bank accounts, two in the Merchants National and one in the Capital National Bank, all of which were checking accounts and all of which were apparently used interchangeably. (R-2 pp. 25, 26.)

The basic books kept by appellant were the daily reports which are in evidence as Defendant's Exhibit "A". These daily reports are for every day of the year that the market was open during all of the years 1943 through 1946. They are in two parts, one in

English and the other in Chinese. They reflect accurately all receipts and disbursements. (R-3 p. 587.) They were kept by appellant, and by his daughter Mary; in 1942 Lincoln Chan had assisted. (R-2 p. 388, lines 17-20.)

At the trial these were explained by appellant and by his daughter Lila. For illustration, at the trial we selected at random one day, January 3, 1944.

Explaining the English portion of the record, in one column were the cash receipts with "currency", "silver" and "checks" stated separately and totaled. (R-3 pp. 703-705.) If there was only a small amount in silver this was left for change and not added (R-3 p. 704), but if the amount in silver was considerable it was added and banked with the currency. (R-3 p. 712, line 11.)

The next column is the "Cash Paid Out" column which has a heading "Pd". The English record shows only the small "cash" payments, not the checks. (R-3 p. 713, line 13.) The next column, on the left-hand side, shows the sales made. These contain two figures, one for each cash register reading, and the total. (R-3 p. 708, lines 16-18 and p. 714, line 19.)

In addition to the cash register readings, the receipts from charge sales are shown and added. (On January 3, 1944, \$111.11 was received.) (R-3 p. 714, line 19.)

The Chinese daily reports are more complete. These show the total sales for the day as shown on the English records, but they also show other receipts; e.g.,

on January 3, 1944, they show rent paid by an employee of \$6.00. (R-3 p. 716, line 20 to p. 717, line 8.) These receipts are shown at the top of the report.

On the bottom are shown the paid-outs, including the cash paid out, miscellaneous and merchandise in separate columns, and these items are a break down of the totals shown on the English report. (R-3 p. 718, line 10 to p. 719, line 15.) In addition, the amounts checked out are shown under captions showing to whom the checks are issued, e.g., "Morrell", "Swift", "Rent" etc. (R-3 p. 719, line 23 to p. 720, line 19.)

As stated above these records are complete for every day in the year, during all these years. (R-3 p. 721, line 16.)

THE CHINESE JOURNAL AND LEDGER.

In 1942 and 1943 appellant had a hired bookkeeper, Lincoln Chan. (R-2 p. 336, line 11.) While he was employed (on a part-time basis) he kept a journal and a ledger in Chinese. These books are in evidence. (Defendant's Exhibit "A".) They cover only the years 1942 and 1943. And are complete for those years showing every transaction of every day. (R-2 p. 338, line 10.) The journal was kept from day to day and its entries were taken from the daily reports which have been hereinabove described. (R-2 p. 337, lines 11; 18.) The second volume was the ledger which is what the name implies. In it items are classified ac-

according to their nature. Posting in the ledger was done at intervals. (R-2 p. 340, lines 1; 12.)

For the purpose of showing the completeness of the Chinese books in 1943, a translation had been made of a summary of all figures contained therein. This summary was admitted in evidence as Defendant's Exhibit "G" and shows all receipts and disbursements classified. The summary was checked against the original books kept by Lincoln Chan and it is correct. (R-2 p. 342, lines 13-18.)

The Chinese books were not kept after 1943. The daily reports contain exactly the same information.

ENGLISH DAILY SUMMARIES OF THE DAILY REPORTS.

During the investigation by the special agents of the treasury department, James Soohoo, an accountant, was employed by appellant to make an audit of the books and to furnish this audit to the agents so that they could understand appellant's books.

At the outset of this investigation Mr. Soohoo informed appellant that it would be necessary to have a translation made, or a summarization in English of the Chinese daily reports. (R-3 p. 759, line 4.) This summarization was prepared by Lila Lowe, appellant's daughter, with the assistance of appellant, and her figures were checked by appellant. (R-3 p. 759.) The summarization includes a complete daily record of all receipts and disbursements excepting the disbursements paid by check as to which appellant had

all of the cancelled checks and furnished them and also the summarizations to the special agents. (R-3 p. 723, line 25; p. 158, line 13; p. 162, line 5.)

THE BUTCHER PAPER MONTHLY SUMMARIES.

In 1943 appellant prepared his partnership returns directly from the Chinese books. In 1944, 1945 and 1946, he prepared them from summaries, referred to throughout the trial as the "butcher paper summaries" which were prepared from the "Daily Reports". (R-2 p. 463, line 23; p. 464, line 4; p. 466; p. 467, line 12; p. 489, line 23.)

During the investigation appellant furnished these butcher paper summaries to Special Agent Englund and they were found to agree with the partnership return. (R-2 p. 167, line 9; p. 189, line 21.)

These butcher paper summaries appear in evidence as Defendant's Exhibits "T", "U" and "V". They are in English. They are similar to the translations of the Chinese books introduced as Defendant's Exhibit "G" showing all items of receipts and expenditures by classification and for each of the months of each of the years.

DELIVERY OF ALL BOOKS AND RECORDS TO SPECIAL AGENT.

On March 24, 1947 appellant delivered to Special Agent C. L. Englund (1) all of the daily records in English and in Chinese which are Defendant's Ex-

Exhibit "B". (R-3 p. 650, lines 2-10.) These were re-
 ceipted for as follows:

"Memo sheets containing a chronological tabulation of sales and expense items recorded in English which were entered on deposit slips of the Merchant's National Bank for the period 1943 to 1946, inclusive. * * * Memo sheets containing daily sales and expense items recorded in Chinese on deposit slips of the Merchant's National Bank, together with adding machine tapes for the period 1944 to 1946, inclusive." (R-3 p. 651, lines 1018; Plaintiff's Exhibit 42.)

Also he delivered the two bound books (Defendant's Exhibit "A") constituting the Chinese journal and ledger for the year 1943. (R-3 p. 651, line 19.) Also he delivered the three butcher paper summaries. (R-2 p. 651, line 21.) Also he gave access to Special Agent Englund of all his bank accounts, his cancelled checks, his bank statements and his check stubs. (R-2 p. 148, line 11 to p. 154, line 16.)

**THE EVIDENCE OF THE PROSECUTION RELATING TO THE
 INADEQUACY OF APPELLANT'S BOOKS.**

As has been stated above, the whole case of the prosecution of income tax evasion was built up on the so-called "net worth, expenditures" method.

It was recognized by the special agents that they were only allowed to use this method "when the taxpayer's books and records are inadequate and we are unable to interpret them". (R-2 p. 168, line 1.)

In this case this hurdle was very simply overcome. The prosecution had special investigator C. L. Englund testify to the legal conclusion that the books were inadequate. The following is his testimony (over objection by defendant):

“Well, I informed Mr. Chan that the books and records that he had given me on the first call on March 24, 1947 did not agree with his income tax returns. He stated then that he had some Chinese books and records, and I asked him if those are the records that he used in preparing those various income tax returns and he said yes.

So I asked him if the government could have access to those records. He said they were in Chinese. And then I asked him if he would have any objection to submitting them anyway, and he said no, and he produced them.

Mr. Johnson. Q. Did you make an examination of those additional records, Mr. Englund?

A. Not personally, no. We had a Chinese translate the 1943 records.*

Q. Did you find that upon the basis of all of the books and records which the defendant made available to you you were able to make a correct computation of his income for the years 1943 to 1946 inclusive?

A. No, sir.

Q. Why were you unable to do that?

A. The books were not complete with all the information and there weren't all the information in the books and records.

*Compare this with the statement, *infra*, p. 52, that they couldn't be translated because the dialect was different.

Q. So you found that the books which had been submitted were incomplete, insufficient and inadequate for a correct computation of the defendant's income, is that correct?

A. I did."

(R-2 p. 49, line 12 to p. 50, line 12.)

(The witness then proceeded to testify that the income had been computed on the net worth-expenditure theory.)

Having heard Mr. Englund's conclusion that the books and records were inadequate, let us now see if his own testimony backs this up:

On cross-examination he testified that he was engaged in this investigation for approximately nine months, lasting from March 24, 1947 to February 12, 1948, that appellant cooperated with him fully in every respect, giving him everything he asked for in the approximately twenty contacts which the witness had with appellant. (R-2 p. 147, lines 8-25.)

Appellant gave the agent access to all of his bank accounts, his bank statements, his cancelled checks, his check stubs, his books, including the books now in evidence as Defendant's Exhibit "A" and which are the Chinese ledger and journal to be hereinafter more particularly described. (R-2 p. 148, line 11 to p. 154, line 16.)

"And did he offer full access to those books to you?

A. Translated them to a great extent."

(R-2 p. 154, lines 17, 18.)

We then asked Mr. Englund if he had access to Chinese translators and he stated that he did. (He mentioned Mr. Victor Chin, who was present in the courtroom, sitting with the treasury department agents all through the trial and who checked the translations made by defendant.) (R-2 p. 155.) Thereafter the following very significant testimony was given:

“And Mr. Chin stated that he was unable to identify the Chinese writing in it, because he did not speak the same dialect, apparently, that Mr. Chan had written the books in, so he did not know how to read the headings, like what the——

Q. Then——

Mr. Seawell. Let him finish his answer.

Mr. Pierce. Go ahead by all means. Had you finished?

A. He said he was unable to identify the heading, but he could read the figures, so I would, transcribe the figures on adding machine tapes.

Q. And did you transcribe all of the figures contained in those two books?

A. Not all the figures, no sir.”

(R-2 p. 156, lines 1-14.)

We then asked him what figures he had transcribed and he said that he had transcribed the figures for 1944 and 1945. We informed him that the books only covered 1942 and 1943 and the witness said that Mr. Chan had told him they covered 1943 to 1946. (R-2 p. 156, line 22 to p. 157, line 17.) He later said that he just assumed that he was reading from books cov-

ering 1945, 1946 and 1947 and that Mr. Chan did not tell him they were books for those years. (R-2 p. 158, line 16.)

The witness again testified:

“Q. Do you say that Mr. Chin (the interpreter) did not read the dialect in which these books were written?

A. He stated that he could not read the dialect in which these books were written.”

(R-2 p. 158, line 21.)

The witness then testified that he had gotten a translation of the sales for 1943 from Mr. Chan and that this translation had been accepted as correct. He had also gotten a translation of cash pay-outs for the years 1944, 1945 and 1946. He never had a complete translation of the books or records. (R-2 p. 159, line 7 to p. 162, line 17.)

The witness was then shown a typical batch of the records which were known throughout the trial as “daily reports” or “daily records”. These are Defendant’s Exhibit “B”. They are on deposit tags of the Merchants National Bank. They are in English and in Chinese. They will be explained more fully hereafter.

The witness testified these records had been submitted to him during the investigation. He then testified:

“Q. Did he tell you how they were kept?

A. No, he tried to make an explanation, but they had no reference on them as to what the

figures represented, so for our purposes we had nothing to back them, so we didn't use those."

(R-2 p. 163, lines 4-8.)

Mr. Englund testified that the appellant informed him that these were his books, but Mr. Englund made no effort to check them to find out what was in them. He stated that they were not adequate and he assigned as his reason:

"Q. Did you make any effort to find out what the various items were on those records?

A. No, because on the face of them, there is no information that would indicate what they were for. They are just figures.

Q. Did you ask him what the various columns meant?

A. Chan tried to explain them, I believe he stated some of those were kept by his daughter and that she could probably interpret but I never asked her * * *

Q. Did you make any effort to have these translated?

A. No, sir."

(R-2 p. 165, line 20 to p. 166, line 12.)

(It is clear from the testimony quoted above that Mr. Englund had only to ask Mr. Chan or his daughter for the explanation of column heads and all of the reports would have been revealed as a complete record of receipts and disbursements.)

In addition to the bound Chinese records and the daily reports, Mr. Chan brought to Mr. Englund, the summaries which are now in evidence as Defendant's

Exhibits "T", "U" and "V". (These are on butcher paper and are complete summaries month by month for all of the years, stipulated to be correct, of all sales receipts and all expenditures classified in the various categories of accounting.) (R-2 p. 167, line 8.)

This summary agreed with the partnership returns filed by the appellant (R-2 p. 190, lines 1-6.)

On redirect examination, Mr. Englund added to his explanation of the inadequacy of appellant's books as follows:

"Q. What was your reason for concluding, as you have testified that you did, that the Chinese books and records were not adequate for a computation of defendant's correct income for tax purposes?

A. Because we were unable to read them.

Q. And was that the only reason?

A. No, we couldn't identify the amounts that were in the books. He had a set of records in English, that he submitted on those cards that were submitted in evidence, which when totaled did not agree with the income tax return."

We were able to bring out on cross-examination as to why the totals did not "add up".

We had asked Mr. Englund how he had totaled the daily reports in English. We asked:

"Q. How did you distinguish which were purchases and which were sales?"

(We asked this in view of his previous testimony that he didn't know which column was which.)

“Mr. Chan tried to explain—it appeared that they were all treated the same way * * * We were unable to follow him.

Q. And isn't it a fact that the reason your total didn't add up was because sometimes you didn't know you were writing debits and sometimes you didn't know you were adding credits?

A. That is correct.”

(R-2 p. 209, lines 10-19.)

We ask the Court to consider the following significant statement by the witness:

“Mr. Johnson. I will ask you, Mr. Englund, your reasons for concluding that the taxpayer's Chinese books and records were inadequate for the purpose of computing his correct taxable net income for this period?

A. It appeared that the taxpayer's books and records did not contain complete information with respect to all his transactions. In other words, he made transactions that were not recorded, *which he stated were not recorded in his Chinese books and records.*”

Extra-judicial statements by the appellant again—the sole basis for the claim of inadequacy of the books!!

“A. The taxpayer's books and records did not show the purchase of this building—I mean the records that he submitted to us, other than the cancelled checks.

Mr. Pierce. What records do you mean?

A. The records that—those records that you just introduced in evidence since——

Mr. Pierce. How do you know they don't?

A. He said they didn't."

(R-2 p. 194, lines 18-25.)

Later in his examination it became evident that all the taxpayer had told Englund was that the purchase of the building did not appear as a purchase by the partnership in the records of the Palace Market. (R-2 p. 196, line 8.)

Of course, there would be no such record. The building was not a purchase of the business. It was purchased by Chan personally and he did have record of it in his cancelled checks, and also in the special book which he kept for his individual records, the black book which was later introduced in evidence as Defendant's Exhibit "D".

THE CHINESE WRITTEN LANGUAGE.

The first reason expressed by special agent Englund for disregarding the books and records of the appellant in favor of the artificially constructed "net worth-expenditures" balance sheet was the fact that the Chinese books and records could not be translated by their Chinese interpreter, Victor Chin. (R-2 p. 156, line 1; R-2 p. 158, line 23.)

The following are the facts of the matter:

Lincoln K. Chan testified:

"Q. Do the different dialects use a different written language, or the same written language?

Mr. Seawill. I am going to object that it is irrelevant, immaterial what language the Chinese write in. Nobody has questioned it.

The Court. Overruled. You may answer.

A. Well there is only one writing, as far as I know.

Q. * * * That is all you have ever seen?

A. That's right."

(R-2 p. 341, lines 12-21.)

Lila Lowe testified:

"Q. By the way, from what you know about the Chinese language, do they have different writing for different dialects, or is the writing the same?

A. The writing is the same."

(R-3 p. 683, line 19.)

The fact that the Chinese, although they speak in many different dialects, have but one written language common to all sections of the country and to all dialects, is a matter of which this Court will take judicial notice.

The article on "Chinese Language" in Encyclopedia Britannica (Vol. 5, 1948 Ed., p. 567) after referring to the many dialects, states:

"The dialects proceed from the same parent stem, are spoken by members of the same race, are united by the bond of writing, the common possession of all * * *"

On page 570 the same author says:

"The characters are a potent bond of union between the different parts of the country with their various dialects * * *"

THE AUDIT MADE OF APPELLANT'S BOOKS.

The investigation of the government into appellant's financial affairs was commenced in March 1947. His books were taken by the special agents of the Internal Revenue Department and were kept for a year. (R-3 p. 649, line 20.)

In March of 1949, or April, Mr. James Soohoo and Mr. Willis Gee, accountants, were employed to make an audit of the appellant's books and records. (R-3 p. 758, line 24.)

They made this audit, and it was furnished to the special agents of the government. They had access to the same records that the agents had had possession of for over a year, the cancelled checks, the bank accounts, the bank statements, the daily reports in Chinese and English, the Chinese journal and ledger. (R-3, p. 757.) With the exception of three or four checks all the checks were at hand, and the absence of those four was offset by the bank statements. (R-3 p. 757, line 21.) Summary translations were made of the Chinese books. Like Mr. Englund, Mr. Soohoo does not read Chinese. (R-3 p. 759, lines 1-25.) They didn't have to use the English portion of the daily records since the Chinese portions and the translations were complete. They found the records complete for every day of every year. (R-3 p. 762, line 3.) They had before them the income tax returns. (R-3 p. 763, line 22.)

They made work sheets on the basis of which their audit was prepared. (R-3 p. 776, line 10.) The audit when completed was presented to appellant and to

special agent Krause of the Internal Revenue Department. (R-3 p. 777, line 12.)

A balance sheet was prepared based upon the findings of this audit. (This balance sheet is in evidence as Deft's. Exhibits AA, BB and CC, and because of the importance thereof the audit is set forth in an appendix to this brief.)

1950
ASSETS AND LIABILITIES OF THE PALACE MARKET JANUARY 1, 1950. (EVIDENCE OTHER THAN EXTRA-JUDICIAL ADMISSIONS.)

At the beginning of period, January 1, 1950, the business kept cash on hand of approximately \$1,000.00 (R-2 p. 482, line 25 to p. 483, line 3) and approximately \$2,000.00 in the office safe. (R-2 p. 483, line 12.)

At the same date there was cash in the bank according to the adjusted bank balances of \$579.58. (R-2 p. 781.)

The business inventory was approximately \$500.00. (R-2 p. 485, line 4.) The value of equipment was \$500.00. (R-2 p. 485, line 22.) The business owned nothing else then. (R-2 p. 488, line 25.) The total assets of the business were thus \$5,079.58.

The liabilities of the business on January 1, 1943 were as follows:

Jack Chan stated that the business owed him \$8,100.00 then. (R-2 p. 489, lines 14-21.) These back wages had been accumulating since July, 1940. (R-2

p. 600, line 25.) The business also owed him other money, a total of \$4,658.24 for advances which he had made to the partnership as follows: appellant put a mortgage on his house for \$2,000.00 and put the money into the business. Then when the North Sacramento market was opened by the partnership he sold the house, received a net of \$1,000.00 and put this into the business. The balance of \$1,658.24 was obtained from loans on his life insurance. (R-2 p. 490, line 7 to p. 492, line 19.)

The business owed the Hip Hing Company of San Francisco \$300.00 on January 1, 1943, money which had been borrowed in 1941. (R-2 p. 492, line 21.) Lai Ching Low who was a witness also mentioned this loan. (R-2 p. 441, line 4.) There were no other liabilities owed by the business January 1, 1943. (R-2 p. 493, line 7.) Total liabilities therefore were \$13,058.24.

**ASSETS AND LIABILITIES OF JACK CHAN INDIVIDUALLY
JANUARY 1, 1943. (EVIDENCE OTHER THAN EXTRA-JUDICIAL
ADMISSIONS.)**

Jack Chan had no cash on hand on January 1, 1943—all of the bank accounts were business accounts. (R-2, p. 494, lines 4-25.) Of course, the indebtedness of back wages of \$8,100.00 owed by the business to Chan and the \$4,658.24, were assets of appellant. As accounts receivable, appellant had owed to him \$3,600.00 of which a partner Lai Chung Nam owed him \$1,000.00, Chong Quong owed him \$1,000.00, Chan Tim \$1,000.00, Chan Pon \$400.00 and Chan Lai

\$200.00. (R-2 p. 495, line 11 to p. 498, line 11.) He owned war bonds in the sum of \$243.75. This was covered by stipulation. In 1943 Chan had an Oldsmobile automobile later sold for \$450.00. Its value January 1, 1943 was therefore at least that amount. (R-2 p. 505, line 12 to p. 506, line 15.) He owned other items the value of which was stipulated to: personal jewelry \$1,000.00, home furnishings \$500.00. He also owned life insurance on which he had borrowed \$4,172.62 and which was therefore worth at least that amount. (R-3 p. 854, lines 1-16.)

Appellant's liabilities January 1, 1943 were as follows:

Appellant had borrowed the sum of \$1,000.00 from J. B. Johnson in 1940 which loan was still outstanding in 1943. This money was used for the trip to China. (R-2 p. 506, line 20 to p. 507, line 14.) Since the cash value of his life insurance is listed as an asset the loans against it must be carried as a liability. (R-3 p. 854, lines 1-16.) Also he had a partner's liability for the deficit (excess of liabilities over assets) in the sum of \$1,695.73. Thus on January 1, 1943 his individual assets were \$22,724.61, his total liabilities were \$6,868.35 and his net worth \$15,856.26. (See Appendix p. ii.)

ASSETS AND LIABILITIES OF PALACE MARKET AND/OR APPELLANT JANUARY 1, 1943, AS BUILT UP BY PROSECUTION THROUGH CLAIMED EXTRA-JUDICIAL ADMISSIONS.

As stated above as its principal witness, the prosecution offered special agent C. L. Englund. We have shown how he (1) disregarded the partnership because Mr. Chan had told him "1941 all partners, everybody dropped out of business" and (2) disregarded all the books and records of appellant as inadequate principally because Mr. Victor Chin, his interpreter, had told him that portion which was in Chinese had been written in a different dialect. Mr. Englund then proceeded to use the "net worth-expenditures" method of proving income tax evasion and built up the appellant's beginning net worth (January 1, 1943) as follows:

(All of the prosecution's evidence in this connection was cumulated in Plaintiff's Exhibit 39.)

First of all, as Chan's cash on hand, the agent took the sum of \$350.00 *which he said appellant had said* was the amount usually kept. (R-2 p. 54, line 18 to p. 55, line 22.) Then *he said that appellant had said* that he usually kept about \$1,000.00 in the safe. (R-2 p. 57, line 2.)

As to cash in banks we had a stipulation and the bank statements were also in evidence. However, the bank balances had to be adjusted for checks which were outstanding on January 1, 1943. Our stipulation did not cover errors made by the government in the adjustment. The correct adjusted balance for January 1, 1943 by checking the statement of the bank

against the cancelled checks (then outstanding) was \$579.58. The government nevertheless used as this figure \$1,333.97. (R-2 p. 59, line 11.) The prosecution listed no personal accounts receivable for appellant as of January 1, 1943 and \$500.00 as business accounts receivable. This was based solely upon what agent Englund *said that Mr. Chan had said*. (R-2 p. 65, lines 3 to 19.) Also the agents *said that Mr. Chan had said* that the accounts receivable of the business averaged about \$500.00. (R-2 p. 66, line 7.) The value of war bonds, \$243.75 was also stated on the basis of what the agent said that Mr. Chan had said. (R-2 p. 71, line 5.) However, in this case the statement was correct and we believe it was stipulated to. The inventory was taken from the partnership return showing inventory in the sum of \$500.00. (R-2 p. 83, line 1.) The value of equipment was stated at \$22,009.50. This was based solely on what the agent *said appellant had said was the value*. (This figure was manifestly an absurdity. The equipment was old and dated back to 1933 when the total of all capitalization of the partnership was only \$25,000.00. Appellant's testimony at the trial showed it was only worth \$500.00. (R-2 p. 485, line 4.) (Although the use of this absurd amount was immaterial from an accountant's standpoint since it was carried out through the whole period, it served to swell the figure of the appellant's total net worth at the end of the period—given to the jury as \$83,113.11 and therefore gave the jury an entirely erroneous impression of this net worth. That was undoubtedly why it was used since anyone could

have seen by casual glance that the equipment was worth no such figure.) The value of furnishings fixed at \$1,000.00 was again merely *what the agent said Mr. Chan had said* was its value. (R-2 p. 86, lines 5-12.) The value of personal jewelry was fixed at \$1,000.00. This also was based entirely upon *what the agent said appellant had told him it was worth*. (This is the second item which the agent correctly reported.) This list of assets, based entirely upon hearsay and including the fictitious figure of \$22,009.50 is \$27,937.22.

It is when we turn to the liabilities that we get the staggeringly distorted picture. Listing of course all business debts as appellant's debts the agent takes first the debt of the Palace Market to Hip Hing Co. in the sum of \$300.00. This was based upon *what the agent said appellant had said* he owed. (R-2 p. 93, lines 14-24.) So also with the debt to J. B. Johnson, \$1,000.00, the agent said that Chan said this was owed. (R-2 p. 95, line 9.) (Both of these debts WERE owed but the Hip Hing debt was owed by the business as the evidence clearly shows.) It is the next items, however, which completely confuse the picture. The testimony is as follows:

“Mr. Johnson. Now during these conversations with Mr. Chan, did he tell you anything about any other accounts payable he had?

A. Yes, sir.

Q. What was the next one?

A. He had an account payable to Mr. Chin Wing.

Q. What did he tell you about that?

A. He said he owed Chin Wing \$4,800.00 on a debt acquired in the early thirties, and the debt was still outstanding December 31, 1942 and that he paid the amount in 1946.

Q. Did he produce a check by which payment was made?

A. He did."

(R-2 p. 96, line 14.)

Now, it has been shown above that Chin Wing was appellant's uncle and a partner in the business who had died in 1928, owning an interest in the business of \$2,000.00; that his son Chin Him was listed as the representative of the family in succession of the family interest, that in 1946 when the widow Mrs. Chin Wing desired to be paid off she received this amount plus assignments of other partners' interests. There was no dispute about this. Chan had so informed Mr. Englund.

"Q. What did Mr. Chan tell you about Chin Wing's relationship to the business?

A. Chan stated that that check represented a payment that he had made to Chin Wing. Chin Wing had been a former partner of his—was a partner with him in about 1923 and Mr. Chin Wing had dropped out of the partnership in 1932, that he had paid his liability to Chin Wing in 1946 with that check."

(R-2 p. 147, lines 1-5.)

All of the partnership returns 1943-1945 list Chin Him, the son, as the partner. These returns were available to and presumably studied by the agents, although

from their testimony it would appear they evinced a singular lack of curiosity throughout their investigation as to the identity and interests of the several partners.

The so-called indebtedness of appellant to Chin Wing *having thus been fixed by the hearsay testimony* of the agent, the next hearsay is with reference to a claimed account owing to Quok Brothers, \$2,600.00. Mr. Englund said that Mr. Chan said that he owed Quok Brothers this amount in 1943 and discharged it in 1946. (R-2 p. 97, line 23 to p. 98, line 3.) It will be remembered that the Quok Brothers (one of whom is also known as Fok Wah), were the sons of Fok Chung also known as Foo Chong, also known as Fok Yuen Cheong.

The fact that this hearsay was completely refuted by the following written agreement between the parties was a source of no embarrassment whatever to the agents.

“This is evidence that I am now presenting my late father Fok Yuen Cheong’s bequeathed share of \$2,600.00 American money in the Palace Market * * * I am yielding the entirety of this share to be bought by Chan Jock Wei. After April 8, 1946, any profits or losses of the business will be shared or borne by Chan Jock Wei * * * one half of the share which \$1300.00 must be paid first. The remaining half of the \$1300 to be paid before May 8, 1946.”

The letter is dated April 4, 1946 signed by “Fok Wah”.

The first check was dated April 8, 1946, the second check was drawn May 8, 1946. These are the checks which the agent said appellant had said were in payment of a debt owed in 1942! (R-2 p. 98, lines 9-17.)

Thus far the agent through "admissible hearsay" has created debts of \$7,400.00 owed by appellant on January 1, 1943. The next step was to "blanket in" \$20,000.00 more in debts.

"Mr. Johnson. Q. Did Mr. Chan tell you that he had any further accounts payable?

A. He did.

Q. What was the nature of that liability?

A. He said that he was indebted to various former business associates in the amount of \$20,000.00 which he had reduced during this period 1943 to 1946 to \$10,000.00."

(R-2 p. 98, line 23 to p. 99, line 4.)

It is fairly obvious by now that Mr. Englund's characterization of what appellant told him is a little broad. When pinned down to ACTUAL CONVERSATIONS all that the appellant ever said was "'41, all partners, everyone dropped out of business".

The total liabilities are thus stated to be \$28,700.00, every cent of which is built up upon appellant's claimed extra judicial statements, and since the assets are built up the same way we have a beginning net worth of minus \$762.78 constructed in complete disregard of the books and records and built solely out of the sands of Mr. Englund's recollection of what the appellant told him.

**ACQUIRED ASSETS AND LIABILITIES OF APPELLANT AND
THE PALACE MARKET 1943-1946.**

As to the acquired assets of appellant and of the Palace Market during the period 1943-1946 there is little conflict in the evidence.

“Cash on hand” and “in the safe” remain constant throughout the period. “Cash in bank” is based upon adjusted bank balances and although there are differences between the figures stated by the plaintiff (Plaintiff’s Exhibit “39”) and defendant (Defendant’s Exhibit “AA” Appendix) these differences are not material.

The business accounts receivable remained constant. On December 13, 1945 appellant loaned the Bing Kong Tong \$500.00. In 1946 when according to appellant he bought out his partners, the debt of \$3,600.00 owed by them was wiped out. (R-2 p. 501; R-3 p. 852, lines 1-18.)

There were small increases in war bonds; an automobile was purchased for \$1,100.00, the amount of personal jewelry remains constant, as do the life insurance policies; there is a small increase in the value of home furnishings, and the inventory and equipment at the market increased in value to a small extent. (Pltf’s Exhibit 39; Defendant’s Exhibits AA and BB, Appendix.)

In 1944 appellant individually bought the building in which the Palace Market is located. The facts with reference to this purchase were stipulated to and are embodied in Plaintiff’s Exhibit 12. The purchase price was \$57,500.00. Appellant made a down payment of

\$15,000.00 and there were two secured loans against the premises which totalled \$42,500.00. The second loan was paid off in 1944, the total paid being \$7,702.86, interest was paid on the first loan. This note was reduced by \$10,000.00 in 1945, and by an additional \$5,000.00 in 1946.

In 1943 appellant acquired a dwelling in Sacramento for which he paid \$6,767.42. (Pltf's. Exhibit 11.)

In 1944 appellant bought a lot for \$100.00. He made improvements on this lot of \$251.20. (Deft's. Exhibit BB.)

Where did he get the money with which to make these purchases? If the theory of the prosecution is correct and the evidence justifies the conclusion that the partnership had been dissolved by a meeting held in 1941, and that the appellant then became the owner of all of the business (for which he admittedly did not pay until 1946 and after) then the money came from appellant's earnings.

If, on the other hand, the partnership was still in existence during the period 1943-1946 the following is the explanation of the acquisition of these assets.

Defendant employed and called to the stand as its expert a Sacramento certified public accountant, George Harbinson. He checked the books and records of the appellant and the audit made by Mr. Soohoo.

He gave the following testimony:

"the partnership started with a liability of over \$12,000.00 to Jack Chan. At the end of this period

Jack Chan owed the partnership \$36,000.00 or in other words, there was a change from a decrease of \$12,000.00 on the one hand to an increase of \$36,000.00 on the other hand of over \$48,000.00 that was taken out of the partnership over and above the partnership salaries and the building rentals * * * this balance sheet was built up by taking the treasury figures and building up through your salary and your rental income to show that Mr. Chan was actually able to accumulate this building, his house, his automobile by withdrawals from the partnership * * * by borrowing from the partnership." (R-2 p. 1001, line 23 to p. 1002, line 21.)

The whole financial picture of the assets and liabilities of Jack Chan and the Palace Market are graphically set forth in Defendant's Exhibits AA, BB and CC, Appendix. Most of the items of this balance sheet have already been explained. The use of "clearing accounts" should receive a word of explanation. Mr. Harbinson explained the "clearing account, other partners" as follows:

"These clearing accounts of other partners represented the partner's share of their food and donations that was consumed each year and it was charged in the partnership return as a donation. This was set up so as to catch—this was set up as an amount due (from) the partners—in effect that would be an advance to the partners of their share of the food and their share of the donations."

(R-3 p. 992, lines 12-20.)

He also explained "clearing account, Jack Chan":

"At the end of 1942 the Palace Market owed Jack Chan \$4,658.24 in a clearing account and \$8,100.00 in back wages. Now at the end of 1943 Mr. Chan had withdrawn over and above his partnership salary \$1,806.08 * * * Bear in mind that Mr. Chan's bookkeeping was on a single-entry system. Now if Mr. Chan had converted his system into a double entry system, this is the way this item would appear * * * and the various items of expense in 1943 * * * which he withdrew and the various checks are actually charged against Mr. Chan's account as personal withdrawals. Then against that he was credited with his salary, and in later years also the rental income from the building * * * In the year 1943 he was actually charged with \$16,833.07 * * * those represent his withdrawals and against that you have the various items of salary accrual and the car that he put in the business so the difference after picking up your * * * increase * * * at the end of 1943 Mr. Chan owed the Palace Market \$1,806.08."

(R-3 p. 993, line 21 to p. 994, line 24.)

Mr. Harbinson explained the figures in 1944 as follows:

"Q. * * * Now let's take the figure at the end of December 31, 1944. I note that Jack Chan owes the partnership \$19,734.81. Will you explain how you arrived at that figure?

A. Yes. In 1944 the total withdrawals by Mr. Chan were \$28,813.73 * * * we have these classified * * * into \$274.85 for his personal account, then \$351.86 for the board which we charged him for, then the sum of \$63.00 for donations * * *

\$5.50 for a bank charge, and \$24,118.52 for the amount which he withdrew to make a down payment on the building * * *

Now, against that amount Mr. Chan—his partnership salary was \$4,260. He also cashed war bonds * * * \$937.50. He collected on his building rents, * * * He also was loaned by his wife, \$2,000.00, and his rent * * * for * * * the Palace Market was \$1,687.50.

Q. * * * And you find then, the net withdrawals were \$19,734.81 is that correct?

A. That is correct."

(R-3 p. 997, line 18 to p. 998, line 22.)

The witness showed that similarly in 1945 appellant drew a total of \$18,573.32 from which would be offset his salary and rentals. (R-3 p. 999, lines 3-9.)

In 1946 there were withdrawals of \$22,245.67 and after credits, the accumulated total was \$36,058.80. (R-3 p. 999, lines 13-23.)

EXPLANATION OF "EQUITY IN PARTNERSHIP DOES NOT REFLECT GAIN IN BOOK VALUE".

There had been left off the balance sheet the increase in the book value of the partnership resulting from the purchase of an increased interest in the partnership in 1945 and 1946. The reason for this was explained by George Harbinson, the C.P.A. The purpose of the balance sheet was to show the increase in net worth which resulted in taxable income. Since the acquisition of a capital asset is not taxable income

and no tax is payable thereon until the asset is disposed of, the inclusion of that increase of net worth due to such acquisition would have been a false element in the case. (R-3 p. 1057, line 16 to p. 1058, line 5.)

**COMPUTATION OF NET WORTH ON BASIS OF PALACE
MARKET BALANCE SHEET.**

A most significant document in this case is Defendant's Exhibit "CC", Appendix.

It will be recalled that the special agents' computation was drawn up based upon the assets of the business treated as being solely owned by appellant. In Exhibit CC taxable net income was shown, also using the balance sheet of the Palace Market, but unlike the special agents' the business was assumed to be a partnership and the books and records were used.

There are some questionable percentages used in this tabulation WHICH HOWEVER DO NOT AFFECT THE RESULTS IN THE SLIGHTEST. Mr. Chan's interest in the partnership in 1943 was assumed to be 50/250ths. Actually in 1943 there was only a total capitalization of \$22,500.00. The partnership return for the year 1943 shows the list of partners (Plaintiff's Exhibit 5) and Mr. Chan's interest is stated at 50/250ths or 1/5th. This interest was the interest used by the accountants and was apparently not seriously questioned.

Taking the partnership income as the basis each year, appellant's proportion thereof was set forth,

his salary was added, his individual income was added, his wife's share was deducted, his reported net income was deducted and the net difference was shown. Thus it was shown that if the partnership were in existence as claimed by appellant the total deficiency of income reported over a period of four years was only \$3,693.97.

This deficiency was explainable to mistakes by appellant in his method of income tax accounting.

**THE ERRORS MADE BY APPELLANT IN HIS
INCOME TAX ACCOUNTING.**

Appellant's bookkeeping methods were not perfect. Like many small businesses the Palace Market had a single-entry system. It has been described above. The meaning of "single-entry" was also described by Mr. Harbinson:

"The single-entry system is a system whereby the operations of the business are recorded by receipts and disbursements only. There is no attempt made in the single-entry system to tie in your asset-liability and net-worth accounts, and so you have * * * your receipts and disbursements on the one hand and your assets, liability and net worth accounts on the other hand, but there is no attempt to tie these two together as there is in the double-entry system."

(R-3 p. 979, lines 10-17.)

"Also on a single-entry system there is no check for errors, because of the fact that you don't have

two self-balancing sets of accounts like you do in a double-entry system. You cannot readily check your errors.”

(R-3 p. 979, lines 18-21.)

The weaknesses of the system were described by the witness:

“I would say that it had definite weaknesses * * *

“* * * The first weakness is in the method of handling charge sales * * * Mr. Chan did not ring up his charge sales in the register * * * he didn’t have a charge sale key. Similarly when a customer came in and paid his account, it wasn’t rung up in the register, but merely filed on a spindle and added at the end of the day * * * if the tag was forgotten there would be no way for Mr. Chan checking that that ‘received on account’ would be added in that day’s total * * *

“* * * There was one other weakness in that system * * * His total sales were listed, and then he also had cash pay-outs for various items * * * which every business has. If you subtract the cash pay-outs from your total sales, or total cash receipts, if that would be clear, you would arrive at the net amount of cash which is available at the bank.

“Now most businesses of any size take that net amount of cash and deposit it in cash the next day to the bank thereby keeping control of the cash. Mr. Chan * * * took the total in the cash register, subtracted his pay-outs and then put the difference in his safe and banked the balance as he got too much money * * * and thereby there

would be no control to see whether all that net cash went into the bank, or whether it didn't go into the bank, so if there were mistakes in banking those would not be readily ascertainable * * *"

(R-3 p. 979, line 25 to p. 982, line 9.)

The system used by appellant was not unusual:

"In many of your smaller businesses, such as meat markets, gas stations, and similar businesses of this nature where the proprietors are rather ignorant of bookkeeping you will find the system rather general."

(R-3 p. 982, lines 13-16.)

There were certain obvious errors in the partnership returns all of which were readily determinable by reference to the books and records.

For example, in 1943 as a deduction for the expense of business, appellant listed "labor—\$6,315.00". This included the labor of employees and this was correct. However \$5,000.00 was included for the wages of working partners and this is not a proper income tax deduction. (R-3 p. 1010, line 12 to p. 1011, line 11.) This is a common error. (R-3 p. 1011, lines 12-17.) Similarly partner's board and lodging was taken as a business expense. (R-3 p. 1013, lines 1-25.)

Also appellant listed as repairs certain items which would probably be classified as capital expenditures. (R-3 p. 1011, line 22.) However during the entire period he took no depreciation on such expenditures so that over the useful life of the article this would balance itself out. (R-3 p. 1012, lines 1-25.)

Certain of these mistakes would not have been reflected in the computation of appellant's net income. Part of them would as to appellant's share. (R-3 p. 1017, lines 1-15.)

These mistakes would account for the total deficiency in the totals returned by appellant over this period of four years.

There was no evidence of wilfullness in any of these mistakes.

ARGUMENT.

INTRODUCTION.

It will be our purpose to prove in the argument to follow that the evidence does not support the conviction.

We will first show that the complete dissolution of the admittedly previously existing partnership was the outstanding fact of this case, the link of the chain of the prosecution's case upon which every other link depends.

We will show that if there was a partnership, then all moneys which appellant used to acquire the assets which were acquired and which moneys the government insisted were "gross income" were moneys which the appellant was (and probably still is) obligated to repay to his partners and therefore *not* "gross income".

We will show that there was never any dissolution of the partnership—that the evidence upon which the

prosecution relied to show a dissolution was such that not even a *prima facie* case was made and that the evidence of the defense refuting the claimed dissolution was so complete and convincing that as a matter of law the prosecution has not sustained its burden of proof.

We will also show that in using extra-judicial admissions as the basis for preparing and presenting a "beginning net worth" balance sheet, the prosecution has failed to sustain its burden of proof and we will further show that where the taxpayer has a complete set of books and records which he turns over to the investigating agents and which contain all of his financial transactions, the prosecution does not sustain its burden of proof where it disregards those books in favor of extra-judicial admissions.

At the outset it will be seen that this "Chinese partnership" although unquestionably a general business partnership within the Uniform Partnership law (which is a part of the law of California) also—in the eyes and minds of the Chinese members, partook in many respects the characteristics of a corporation.

Each partner was issued a share certificate and these shares represented a very definite total of a fixed capitalization in the partnership. It was as if each share had a "par value" and represented a fixed and definite sum of money. Another characteristic which in the minds of the Chinese members was analogous to the corporation was the idea of succession. While, of course, in the contemplation of law each death operated as a dissolution of the partnership, it was not

treated as such by the Chinese; so that when such a death occurred, or a withdrawal, the partnership went right on carrying on its business as usual.

These facts are significant in the discussion of the claim of a dissolution of the partnership hereinafter.

PROOF OF A COMPLETE DISSOLUTION OF THE PARTNERSHIP BEFORE 1943 WAS AN INDISPENSABLE PART OF THE CASE OF THE PROSECUTION. WITHOUT SUCH PROOF MONEY USED BY THE APPELLANT TO ACQUIRE HIS ASSETS WAS "COMPANY MONEY" ON WHICH NO INCOME TAX IS PAYABLE.

It was the theory of the prosecution that from a beginning net worth of minus \$762.78 in 1943 appellant's net worth at the end of 1946 increased to \$83,113.41 which constituted an increase of his assets over his liabilities during the period from 1943-1946. (Plaintiff's Exhibit 39.) It was the theory of the prosecution that this money had all come from sales of the business. Obviously, this was the only source from which it could have come. In other words all moneys to which the appellant had access were moneys received from sales made in the Palace Meat Market.

Now, if the Palace Market was solely owned by appellant during this period then all of such money was his "gross income"; and should have been reported as such in his individual income tax return; and a tax should have been paid thereon.

On the other hand, if the Palace Market was a partnership during that period, as claimed by appellant

and as the partnership returns show and appellant's individual returns reflect, then the only portion of the sales receipts which appellant was required to return is that portion which constitutes his share of the net profit and his wages. These, he did report (with the mistakes above noted).

Also, and this is equally clear, any moneys which appellant "over-drew" from the partnership funds in excess of his salary and his share of the profits was not "gross income".

Section 22(a) of the Internal Revenue Code (26 U.S.C.A. Sec. 22(a) defines "gross income" as "gains, profits and income derived from salaries, wages or compensation for personal service", etc. but it does not include loans or overdrafts.

"A taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain and (2) the absence of a definite, unconditional obligation to repay or return that which would otherwise constitute a gain."

Commissioner v. Wilcox, 327 U.S. 404, 90 L. Ed. 752, 166 A.L.R. 884, 66 S. Ct. 546.

Conceding the existence of the partnership, any moneys which appellant drew therefrom in excess of the moneys to which he was entitled as a salary or as net profits were not his moneys; they were moneys which belonged to his partners. They were "loans" and no more the subject of income taxation than are loans received from a bank.

Even if it should be contended that these moneys were not borrowed but embezzled, the result would be exactly the same.

In *Commissioner v. Wilcox* (Feb. 25, 1946), 327 U.S. 404, 90 L. Ed. 752, 166 A.L.R. 884, 66 S. Ct. 546, the taxpayer had been employed as a bookkeeper for a transfer and warehouse company, had embezzled about \$12,000.00 of the company's money and converted it to his own use. It was claimed by the commissioner that these embezzled moneys constituted gross income as defined by Section 22a of the Internal Revenue Code. The Circuit Court of Appeals had reversed the Tax Court decision so holding. The United States Supreme Court, per Mr. Justice Murphy, held, on page 887 of 166 A.L.R.:

“We fail to perceive any reason for applying different principles to a situation where one embezzles or steals money from another. Moral turpitude is not a touchstone of taxability. The question, rather, is whether the taxpayer in fact received a statutory gain, profit or benefit. That the taxpayer's motive may have been reprehensible or the mode of receipt illegal has no bearing upon the application of Section 22(a).

It is obvious that the taxpayer in this instance, in embezzling the \$12,748.60, received the money without any semblance of a bona fide claim of right. And he was at all times under an unqualified duty and obligation to repay the money to his employer. Under Nevada law the crime of embezzlement was complete whenever an appropriation was made; the employer was entitled to replevy the money as soon as it was appropriated

or to have it summarily restored by a magistrate. The employer, moreover, at all times held the taxpayer liable to return the full amount. The debtor-creditor relationship was definite and unconditional. All right, title and interest in the money rested with the employer. The taxpayer thus received no taxable income from the embezzlement.”

(There is a dissent in this case.)

See also:

McKnight v. Commissioner, C.C.A. 5th Ct. 1942,
127 F. (2d) 572.

We do not concede that the moneys “overdrawn” by appellant in this case were embezzled. Appellant at all times has recognized and now recognizes his obligation to account. (R-3 p. 615, lines 3-7.) As a matter of fact it is not clear from the evidence that appellant ever had an exact realization of just how much of the moneys taken by him constituted overdraft. (R-2 p. 538, lines 2-8.)

The status of appellant’s appropriation of funds in excess of his partner’s interest in the net profits of the partnership and his salary (which were reported) is of no concern in this case.

This does make it clear, however, that unless the prosecution has sustained the burden of proof that the partnership was dissolved prior to the commencement of this period, 1943-1946, then there is no case of income tax evasion.

The next step of this argument will be to establish that this burden was not sustained.

THE PROSECUTION DID NOT PROVE DISSOLUTION OF THE PARTNERSHIP. THE CLAIMED EXTRA-JUDICIAL "ADMISSIONS" WERE NOT ADMISSIONS AT ALL.

The method of the prosecution to prove the dissolution of the partnership was by putting special agent C. L. Englund of the Internal Revenue Department on the witness stand. He related what he said the appellant had told him about the dissolution of the partnership. The only testimony which he gave at all which had any probative value was evidence that a sworn statement had been taken from appellant in January 1948. This sworn statement was introduced in evidence. It is undoubtedly a correct transcription of the questions that were asked and the answers that were given at that time.* We will discuss this statement hereinafter.

In addition to the sworn statement, the agent, as has been shown, above gave certain summaries or characterizations of what he said that the appellant had told him. He did not give the actual statements that were made, or even the gist or substance of these statements. He only gave his oral summarization, or characterization, of the impressions he had gained of the appellant's statements during the some twenty conferences which he had had with appellant.

We have set forth (*supra* p. 31, *et seq.*) the testimony of Mr. Englund relating to the claimed extrajudicial admissions of appellant with some de-

*With one exception, we believe in one place it is clear the court reporter has transcribed 1945 as 1935. (Pltf. Exh. 9, p. 9, line 5.)

tail. He testified that appellant had characterized the partnership as "a former Chinese partnership." "He said it was discontinued in 1941." None of the above was given in testimony as any specific conversation but simply as the witness's recollection of the effect of a number of them.

On pages 101-103 Mr. Englund related the dates of a number of conversations which he had had with appellant but didn't state anything that was said specifically in any of them (although the witness purported to keep a diary showing notes of all conferences). Then he said:

"A. We had conferences throughout this period with Chan, and occasionally the partnership was brought up * * *

Mr. Johnson. Do you recall the exact dates of those conferences now, Mr. Englund?

A. No, sir, I don't."

(R-2 p. 103, line 21 to p. 104, line 2.)

This didn't stop the witness from giving an oral summary of his recollection of those conversations.

This method of proving dissolution of a partnership by extra-judicial conversations was objected to, our objection was overruled and by stipulation and in order not to impede the progress of the trial it was understood that our objections went to each question and answer covering such conversations. (R-2 p. 48, line 19 to p. 49, line 8.)

It will be obvious that under the method of interrogation followed by the prosecution we didn't even

THE PROSECUTION DID NOT PROVE DISSOLUTION OF THE PARTNERSHIP. THE CLAIMED EXTRA-JUDICIAL "ADMISSIONS" WERE NOT ADMISSIONS AT ALL.

The method of the prosecution to prove the dissolution of the partnership was by putting special agent C. L. Englund of the Internal Revenue Department on the witness stand. He related what he said the appellant had told him about the dissolution of the partnership. The only testimony which he gave at all which had any probative value was evidence that a sworn statement had been taken from appellant in January 1948. This sworn statement was introduced in evidence. It is undoubtedly a correct transcription of the questions that were asked and the answers that were given at that time.* We will discuss this statement hereinafter.

In addition to the sworn statement, the agent, as has been shown, above gave certain summaries or characterizations of what he said that the appellant had told him. He did not give the actual statements that were made, or even the gist or substance of these statements. He only gave his oral summarization, or characterization, of the impressions he had gained of the appellant's statements during the some twenty conferences which he had had with appellant.

We have set forth (*supra* p. 31, et seq.) the testimony of Mr. Englund relating to the claimed extrajudicial admissions of appellant with some de-

*With one exception, we believe in one place it is clear the court reporter has transcribed 1945 as 1935. (Pltf. Exh. 9, p. 9, line 5.)

tail. He testified that appellant had characterized the partnership as "a former Chinese partnership." "He said it was discontinued in 1941." None of the above was given in testimony as any specific conversation but simply as the witness's recollection of the effect of a number of them.

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It will be obvious that under the method of interrogation followed by the prosecution we didn't even

have the benefit of pinning the witness down to specific conversations, covering specific statements. All that we got were oral generalizations summarizing the witness's understanding and remembrance of what had been said.

The same method of interrogation was adopted by the prosecution in examining the witness, Mrs. J. F. Devine, whose testimony has been reviewed in the statement of facts. (Supra pp. 36-37.)

Typical of her vague generalizations are:

"In 1932 there was again a change of partners * * * Some dropped out and new ones came in and there were various changes of partners until they dropped out in 1941 * * * only the original investments were repaid. At no time were the profits divided * * * and his conversation was the partners that worked in the store received salary. Those who did not or were silent partners, they didn't receive anything except their original investment when they withdrew from the partnership."

(R-2 pp. 227-228.)

This method of interrogation is improper.

In *O'Neill v. United States* (C.C.A. 8th Ct., April 22, 1927), 19 F. (2d) 322, the defendant was convicted of violation of the Harrison Anti-Narcotic Act. One of the agents made a summary of the statements made by the defendant O'Neill in response to the questioning of the officers. This summary or digest was offered and received in evidence over the objection of O'Neill's counsel.

The judgment of conviction was reversed, with the Court saying, on page 325:

“The introduction in evidence of the summary, which Manning (the agent) prepared of the statements given by O’Neill, is also assigned as error. Statements and declarations by an accused, from which, in connection with the evidence of surrounding circumstances, an inference of guilt may be drawn, if shown to have been made voluntarily (citing cases), are admissible against him as admissions (citing cases). But the proof offered to establish such statements or admissions ought to show, at least, the substance and effect of the statement, *and not a mere digest or summary thereof*. Grubey v. National Bank of Illinois, 35 Ill. App. 354. *It is a well settled principle of the law of evidence that a witness who has heard a statement or conversation should not be permitted to state his conclusions as to what was stated or admitted*. Atchison v. King, 9 Kan. 550; Mather v. Parsons, 32 Hun. (N.Y.) 338, 345, 346; Wolverton v. Saranac, 171 Mich. 419, 137 N.W. 211, 212; Irwin v. Nolde, 164 Pa. 205, 30 A. 246; Snell v. Snow, 54 Mass. (13 Metc.) 278, 282, 46 Am. Dec. 730; Henderson v. Brunson, 141 Ala. 674, 37 So. 549; McKee Live Stock Co. v. Menzel, 70 Colo. 308, 201 P. 52, 53; Boone v. Rickard, 125 Ill. App. 438; Grubey v. National Bank of Illinois, *supra*. The summary prepared by Manning and introduced in evidence in the instant case was neither a verbatim transcript of what O’Neill said, nor the substance and effect of what he said. *It was not O’Neill’s statement, but Manning’s statement of the conclusions and deductions arrived at by him from the conversation*

between O'Neill and the narcotic officers. It follows that its admission in evidence was erroneous."

In addition to the above vague characterizations by the agent of what he claimed the appellant had told him there was a sworn statement taken on January 19, 1948. As above stated there can be no question but that this statement is correctly reported substantially—and it is equally clear it is the only statement worthy to be called a statement.

This statement is the Plaintiff's Exhibit 40. At the trial, in the opening statement, throughout the giving of the testimony, in the arguments, it was clear that it was on the statement that the prosecution hinged its whole claim of a dissolution of the partnership. The portion upon which the prosecution relied occurs on page 9 of the exhibit. We have quoted from this statement at length. (Supra p. 38.)

It is impossible to follow all of the statement which Mr. Chan made following the phrase " '41 all partners, everyone, dropped out of business." It is impossible to tell from the context in some of the sentences whether appellant is referring to the partners or the creditors. But more important, it is impossible excepting for that one phrase to tell to what date the appellant refers. It must be remembered that when the statement was made in January 1948, the business WAS "mostly mine, mostly mine". By that time Mr. Chan had bought out his partners. The only place that there is any mention of a date in the state-

ment "then '41 all partners, everybody dropped out of the business".

This is literally true—during the thirties and until 1940 there were many working partners. Then they commenced to quit the employ of the partnership and go into their own businesses. The Palace Market was heavily encumbered. We construe appellant's meaning as being that in 1941 the partners had quit the employ of the partnership.

It might have been possible to interpret his statement as meaning that in 1941 all of the partners had resigned from the partnership—excepting for one significant fact:

In the following five places in the same statement the appellant shows that the partnership had not been dissolved because he refers to its existence in 1945 and 1946:

(1) "Devine. Q. There were twenty-five partners in 1945 and there were ten in 1946?

A. Yes, mam.

(2) Q. Were all these partners in 1945 (pointing to the partnership return for the year 1945) is this the return you filed * * *

A. Yes.

(3) Is this the names of the partners * * * were they members of the partnership in 1945?

A. Yes.

(4) Q. You have Chin Ling listed. Was he a member of the partnership in 1945?

A. Yes."

There was an earlier reference to Chin Ling. The reporter listed the question and answer as follows:

(5) "Q. What year did Chin Ling leave the partnership?

A. 1935."

(Plaintiff's Exhibit 40.)

It is obvious the witness either said 1945 and his answer was misunderstood, or that he misstated himself. The evidence showed Chin Ling did "leave the partnership" and was paid off in 1945.

Elsewhere throughout the statement the meaning of the witness is clear. In page after page reference is made to the repayment to the partners "*when they left the partnership*". The checks with which most of these partners were paid off are in evidence. These checks are all issued in 1945, 1946 and later.

"Q. If they left the partnership did they receive their original investment back?

A. Yes."

Also:

"Q. Was their original investment paid back to them * * * when they left the partnership?

A. I pay them."

Reading the entire statement without stripping a single phrase from the context, it is clear without any doubt whatever that the witness was telling the agents, and the agents understood he was telling them—that there was a partnership in 1945 and 1946; that there were twenty-five partners in 1945 and ten in 1946.

If there had been the slightest question about it when the statement was given, there was not a few days later. Mr. Chan was given a copy of his statement and was asked if there were any corrections. He made the following correction on page 8:

“1946 10 partners J. C.”

This being clear “ ’41 all partners, everybody dropped out of business” could only have referred to the employment.

Thus, there is NO extra judicial statement by the appellant in this case that the partnership was dissolved in 1941.

There is one other fact which must be kept in mind in considering all possible rational interpretations of the statement made by, or attributed to the appellant. Mr. Chan is Chinese.

His understanding of spoken English is fair. His ability to express himself in English is very poor. This has nothing to do with his intelligence, nor even with the reputed reticence of the Chinese as a race. It has merely to do with Mr. Chan's ability to convey his meaning to others by the English language.

There was no reticence about appellant's cooperation with the agents throughout the investigation of this matter; nor in his answers to their questions. Nor was there any reticence about his answers to questions on either direct examination or on cross examination during the trial.

But he did have a great deal of difficulty in making himself understood and the court reporter had a great

deal of difficulty in understanding him. He has a slight stutter when he becomes excited and his manner of speaking is explosive. A reading of his testimony which covers several hundred pages of the record will demonstrate this assertion.

The inferences which it would be permissible to draw from a statement "that in 1941 all partners dropped out of the business" if made by an articulate witness are quite different from the inferences which are permissible to be drawn from the same statement made by this witness under the circumstances existing in this case.

However, even if appellant in 1948 had thought that there was a dissolution of the partnership in 1941, his thinking so would not make it the fact.

In every partnership there must be a community of interest. That there was one here throughout the history of this partnership is clear. If the partnership was dissolved in 1941 then by what act—or words—was this community destroyed?

None of the partners who testified at the trial told of any act, negotiations, words by which the partnership was wiped out. All of the written evidence is to the contrary. In 1943, 1944 and 1945 the business was carried on exactly the same as it had been carried on all throughout the 1930s. None of the partners drew down or attempted to draw down their shares, which shares, as we have seen were treated by them as being similar to corporate shares. This was done in 1945, 1946 and 1947 when Mr. Chan says that the partnership was dissolved.

People who have joined general partnerships which have proven unprofitable would be pleased to know, when a creditor comes around and says "pay me" that all one needs to do to terminate a partnership is to say "I am not a partner any more".

**THE STATEMENTS MADE ARE LEGAL CONCLUSIONS AND
HAVE NO PROBATIVE VALUE WHATEVER.**

Let us assume that this were a civil case in equity for an accounting between Mr. Chan and his partners. Would a statement made by one of the partners that "the partnership was discontinued in 1941," "all partners dropped out of the business in 1941," "the business was mostly Chan's," be considered as adequate proof of the fact of dissolution?

As a matter of fact—and of law—the statement wouldn't be considered at all. It is a mere conclusion of law. Whether or not there has been a dissolution of a partnership is a legal question, the answer to which is dependent on probative facts, not conclusions.

A Court in determining whether there had been a dissolution would turn to minutes of partnership meetings, to written agreements, to letters exchanged, and to oral agreements as contained in actual conversations between partners; but the assertions of partners, or one of them, as to a given legal consequence without inquiry into, or disclosure of, the circumstances and acts has no more probative effect than if the statement had not been uttered.

It is not a question of the weight to be given to the utterance. It is a question of its admissibility.

The statement by one not skilled in law of legal conclusions without giving the facts upon which the legal questions are drawn is useless in proof of the ultimate issue.

If, therefore, in a civil case the statement can have no probative value, how can it be said in a criminal case, not only to be admissible but also sufficient in and of itself to prove the fact?

At this point this Court has perhaps become puzzled, as we have been throughout the history of this case, why the prosecution, if it felt that all of the facts could establish to a moral certainty and beyond a reasonable doubt that there was a dissolution of the partnership at a meeting in 1941, satisfied itself with resting its case upon hearsay statements by the appellant of conclusions of law. There were present in the courtroom, subpoenaed by the prosecution, all of the available partners who had been present at the meetings in 1940 and who presumably would have had some part in the claimed meeting of 1941 where the partnership was supposed to have been dissolved. Why were they not called by the prosecution? We called them when we had to assume the burden of proving the defendant innocent.

Certainly the prosecution must know that a dissolution of a business partnership does not occur—as a matter of law—simply because one partner says “I am no longer a partner”.

Appellant had offered every cooperation with these agents to give them facts. Why were the agents so singularly incurious to ascertain the FACTS about the so-called dissolution of the partnership? Why were no questions ever asked of Mr. Chan or of George Chan or of Henry Chan (who, by the way, although they have a common name, are in no way related) or of Lai Chung Low or of Harry Young to ascertain whether a meeting had been held, or when, or where, or who was present, or what was said, or where are the minutes, or what arrangements were made for the distribution of assets, or the payment of liabilities, or what conversations were ever held, and between whom, etc., etc.?

The only reason we can ascribe seems to be the obvious one. Mr. Chan had told them five times in his sworn statement that the partnership was in existence in 1945 and they believed him. No further questions were asked because the agents themselves were not misled. They knew that appellant claimed the partnership to be in existence.

**ASSUMING THE STATEMENTS CONSTITUTED ADMISSIONS
THEY WERE INSUFFICIENT TO MAKE A PRIMA FACIE
CASE.**

It may be trite to state, but it is a fact which seems frequently to be lost sight of, that the prosecution in a criminal case has the burden of proving that the defendant is guilty to a moral certainty and beyond a reasonable doubt.

If these are not mere words, what becomes of their cogency in this case where the prosecution rested its case on the hearsay—admissible hearsay perhaps, but nevertheless hearsay—statements of the accused—although all the facts were available to the prosecution throughout.

When the prosecution had put in its case there was not one fact in the record which had any probative value which wasn't testimony of what an agent had said that appellant had said. (Moreover, nothing that happened afterwards strengthened the government's case any *either*.)

Giving to the statements made all of the force and effect for which the prosecution contends,—and which we have shown cannot be given them—no rule in American jurisprudence is better settled than the rule that an admission or even a confession is insufficient, unsupported by other evidence, to prove a fact the existence of which must be proven to establish guilt.

It would be profitless and waste of time of this Court to attempt to review all of the case stating this rule.

The clearest exposition of the rule that the defendant cannot be convicted solely upon admissions made by him and that the *corpus delicti* must be established in the case of *Forte v. United States* (C.C.A. District of Columbia, April 5, 1937), 94 F. (2d) 236. In that case the defendant was convicted of transporting a motor vehicle in interstate commerce knowing it to

have been stolen. The Court, in holding that the *corpus delicti* had not been established and reversing the conviction says, on page 237:

“There is some division in the authorities in respect of the rule of proof in cases involving confessions * * *

* * * * *

“Mr. Wigmore concedes, however, that except in a few jurisdictions, the courts in the United States have adopted a fixed rule that corroboration of a confession is necessary. He believes them to have been ‘chiefly moved, in all probability, by Professor Greenleaf’s suggestion that “this opinion certainly best accords with the humanity of the criminal code and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases.”’

4 Wigmore, Evidence (2d Ed. 1923) § 2071, p. 407. In respect of variations of the rule in the United States, Mr. Wigmore states that ‘in most jurisdictions the stricter form of rule is taken, and the evidence must concern the “*corpus delicti*”’: * * *’ 4 Wigmore, Evidence (2d Ed. 1923) § 2071, p. 408.

“The conclusions reached by Mr. Wigmore on the one hand, and by Mr. Greenleaf and the greater number of the courts in the United States on the other, differ because they proceed from contrary premises. Mr. Wigmore’s premise is that there is little danger of false confessions of guilt. He predicates this upon the proposition above quoted that ‘so far as handed down to us in the annals of our courts, [false confessions] have been exceedingly rare.’”

The Court goes on to hold that comprehensive studies made have indicated that the forcing of confessions, far from being rare, are widespread throughout the country. It did not assume that the confession in that case had been forced. It says on page 240:

“Moreover, there is no suggestion in the instant case that the statement of the appellant that he knew the car was stolen was not voluntary. But the case cannot be decided upon an *ad hoc* basis. The question presented is of first impression here; and we feel bound upon a subject touching so materially liberty, and in many cases life itself, and especially in the criminal law where justice requires equality of treatment in respect of trial procedure and proof, to give weight to the findings of the National Commission, and to follow in adopting a rule for this jurisdiction the rule of the great majority of the courts in the United States—that there can be no conviction of an accused in a criminal case upon an uncorroborated confession, and the further rule, represented by what we think is the weight of authority and the better view in the Federal courts, that such corroboration is not sufficient if it tends merely to support the confession, without also embracing substantial evidence of the *corpus delicti* and the whole thereof. We do not rule that such corroborating evidence must, independent of the confession, establish the *corpus delicti* beyond a reasonable doubt. It is sufficient, according to the authorities we follow, if, there being, independent of the confession, substantial evidence of the *corpus delicti* and the whole thereof, this evidence and the confession are together convincing beyond

a reasonable doubt of the commission of the crime and of the defendant's connection therewith."

After reviewing a number of cases on the question, the Court quotes Judge Learned Hand as follows, page 241:

"Probably the most frequently quoted, and we think at times misquoted, case on the subject of corroboration of confessions is *Daeche v. United States* (C.C.A.) 250 F. 566, where the court spoke through Learned Hand, then District Judge. There the indictment was for a conspiracy maliciously to attack vessels in United States waters, with intent to despoil the owners of munitions, by attaching bombs to the sterns of the vessels in such wise that they would explode and destroy the vessels or disable them. The defendant confessed his part in the plan, and the question whether or not there was sufficient evidence of the *corpus delicti*—the agreement to attack the ships—independent of the confession, was raised. Judge Hand expressed his personal agreement with the point of view of Mr. Wigmore discussed *supra*, but said that he nevertheless felt obliged to recognize the rule as contrary. He stated:

"It must be conceded that there has been a very general concordance of judicial opinion in the United States that some sort of corroboration of a confession is necessary to conviction, and this concordance has extended to federal courts as well as elsewhere. *U. S. v. Williams*, 1 Cliff. 5, 28 Fed. Cas. [636] No. 16707; *U. S. v. Boese* (D.C.) 46 F. 917; *U. S. v. Mayfield* (C.C.) 59 F. 118; *Flower v. U.S.*, 116 F. 241, 53 C.C.A. 271; *Naftzger v. U. S.*, 200 F. 494, 118 C.C.A. 598;

Rosenfeld v. U. S., 202 F. 469, 120 C.C.A. 599. That the rule has in fact any substantial necessity in justice we are much disposed to doubt, and indeed it seems never to have become rooted in England. Wigmore, § 2070. But we should not feel at liberty to disregard a principle so commonly accepted, merely because it seems to us that such evils as it corrects could be much more flexibly treated by the judge at trial, and even though we should have the support of the Supreme Court of Massachusetts in an opposite opinion. *Com. v. Killion*, 194 Mass. 153, 80 N.E. 222, 10 Ann. Cas. 911. We start therefore, with the assumption that some corroboration is necessary, and the questions are to what extent must it go, and how shall the jury deal with it after it has been proved. The corroboration must touch the corpus delicti in the sense of the injury against whose occurrence the law is directed; in this case, an agreement to attack or set upon a vessel. Whether it must be enough to establish the fact independently and without the confession is not quite settled. Not only does this seem to have been supposed in some cases, but that the jury must be satisfied beyond a reasonable doubt of the corpus delicti without using the confessions, before they may consider the confessions at all. *Gray v. Com.*, 101 Pa. 380, 47 Am. Rep. 733; *State v. Laliyer*, 4 Minn. 368 (Gil. 277); *Lambright v. State*, 34 Fla. 564, 16 So. 582; *Pitts v. State*, 43 Miss. 472. But such is not the more general rule, which we are free to follow, and under which any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession. Independently they need not establish the truth of

the *corpus delicti* at all, neither beyond a reasonable doubt nor by a preponderance of proof. U. S. v. Williams, *supra*; Flower v. U. S., *supra*; People v. Badgley, 16 Wend. (N.Y.) 53; People v. Jaehne, 103 N.Y. 182, 199, 8 N.E. 374; Ryan v. State, 100 Ala. 94, 14 So. 868; People v. Jones, 123 Cal. 65, 55 P. 698.' [250 F. 566, at pages 571, 572]."

The Court also says, at page 243:

"In the instant case the *corpus delicti* is transportation of the vehicle in interstate commerce from the District of Columbia to Maryland knowing that it was stolen. The contention of the Government that the *scienter* is not a necessary element of the *corpus delicti* cannot be sustained. There is nothing criminal under the statute about transporting a vehicle across a state line unless the person transporting it knows it to be stolen. The law is well settled that the *corpus delicti* includes not only the body or fact of the wrong, in the sense of the death in homicide or the loss of the chattel in larceny, but also the criminal means by which the same came about. * * * It is to be noted, however, that in certain types of crimes involving *scienter* on the part of the accused it is not possible to separate, either conceptually or practically—that is in respect of the proof—the *scienter*, as an element of the *corpus delicti*, and the agency of the accused. So in the crime of receiving stolen goods knowing them to be stolen, and in the crime at bar, it is not possible to separate, either conceptually or practically, the element of guilty knowledge in the transportation and the element of agency of the accused as the

criminal. But this cannot operate to diminish the duty of the Government to present evidence of both elements of the *corpus delicti* independent of the confession.”

We would like to add to the above Court’s reasons for asserting that the “*corpus delicti*” rule has a sound basis, a reason which the facts in this case so clearly illustrate.

A Chinaman accused of income tax evasion, and also accused throughout the trial, as we shall show of black market operations (R-2 p. 354; R-3 p. 647 and R-3 p. 971) was actually guilty of overdrawing his partnership account.

Special agents, possessing all the usual, and perhaps some unusual, zeal of prosecutors were allowed to testify over objection to their summarizations and characterizations of extrajudicial admissions. A sworn statement was also introduced. The prosecution rested its case. Let us stop at that point.

The accused is inarticulate, easily misunderstood. No effort had been made by the agents who took the statement to clarify its meaning. Do we need actual duress or coercion to demonstrate the danger of permitting conviction on such testimony alone?

It does not appeal to our ideas of justice—that, by such proof, the prosecution has established to a moral certainty and beyond a reasonable doubt that the accused is guilty.

Mr. Chan testified as a possible reason for his having made the statement upon which the prosecution

relies that he was "scared" or that he was "disgusted".

(R-2 p. 399, line 22 to p. 400, line 8.)

We do not wish to champion the morals of Mr. Chan in his use of partnership money to acquire the assets which he acquired in 1943-1946. Nor do we wish to exaggerate the wrong to the other partners. Appellant had put 30 long and unproductive years into this partnership. When the going was rough and the creditors were so demanding that a meeting of the partners had to be called, it was Mr. Chan who was called upon—not to make profits, but to prevent the partners from suffering that liability and assessment for liability which would have been necessary to pay off the \$20,000 in debts then owed. After that he put in his own money into the partnership. He borrowed on his home, on his life insurance and it was his hand in the dike which kept the flood out. In 1941 most of the partners had left the employ of the partnership. Those who were on the stand stated they took no active hand in the management after that. The flood season was past. So Chan overdrew. Obviously he had no written authority perhaps no tacit authority to borrow these funds. He did borrow them.

It is not unnatural then that he would be "scared" and attempt to justify himself when questioned by government agents whose purpose in so questioning him never was made clear. It has been said admissions must be received with caution. The soundness of that rule becomes most important when self interest which

usually argues against false admissions, in any particular case argues in its favor.

This is another reason why Courts have said that evidence of extrajudicial admissions must be received with caution and why they cannot be the sole prop upon which the government's case depends.

The following cases have also asserted this rule.

In *Pines v. United States* (C.C.A. 8th Ct., Dec. 5, 1941), 123 F. (2d) 825, the defendant was convicted of falsely counterfeiting securities transported in interstate commerce.

In holding that the *corpus delicti* had not been established the Court says, page 829:

"This, being the *corpus delicti*, could not be presumed, nor could it be established by extra-judicial declaration, confession or admission of the defendant. *Tingle v. United States*, 8 Cir., 38 F.2d 573; *Ryan v. United States*, 8 Cir., 99 F.2d 864; *Gulotta v. United States*, 8 Cir., 113 F.2d 683. The evidence shows that defendant admitted to peace officers that he had possession of the securities in Minneapolis in November, 1939, and that he borrowed an automobile from a Minneapolis party. It appears from the evidence that he had the automobile and the securities in his possession in Council Bluffs, Iowa, in November, 1939. Had there been evidence independent of defendant's admission that he had possession of these securities in Minneapolis, this would have been sufficient corroborative evidence that he transported or caused to be transported the instruments from Minneapolis to Council Bluffs.

Bruce v. United States, 8 Cir., 73 F.2d 972; Bennett v. United States, 70 App. D.C. 76, 104 F.2d 209. There was here, however, no evidence save his own admission that he had possession of these securities in Minneapolis, Minnesota, and there is therefore lacking a vital link in the chain of circumstances by which it is sought to establish the transportation in interstate commerce. The corpus delicti includes not only the body or substance of the crime, but also the criminal means by which it was committed. The corroboration is not sufficient if it tends only to support the admission. It must embrace substantial evidence of the corpus delicti, though it need not in itself be sufficient proof of guilt. Forte v. United States, 68 App. D.C. 111, 94 F.2d 236, 244, 127 A.L.R. 1120; Gulotta v. United States, *supra*."

In *Gulotta v. United States* (C.C.A. 8th Ct., July 24, 1940), 113 F. (2d) 683, the defendant was convicted of falsely swearing that he was a citizen of the United States. A conviction was based upon an affidavit of registration in which the defendant swore that he had been born in Louisiana in 1896 and was a citizen and also a written statement by the defendant before an agent of the Government in which he declared that he had been born in Italy in March 1896 of Italian parents and in which he also admitted that he fraudulently represented himself to be a citizen of the United States. The Court held, on page 685, that extrajudicial admissions or confessions were not sufficient to authorize a conviction of crime unless corroborated by independent evidence of the *corpus*

delicti (citing cases); that independent evidence need not be of itself sufficient proof of guilt but need only be a substantial showing which together with the admission establishes guilt beyond a reasonable doubt. The Court goes on to say, page 686:

“But the rule requires some such independent evidence, and it is conceded by the government that the record is barren of all such extrinsic evidence in this case, unless a distinction be made between confessions and admissions.”

The Court then goes on to hold that there is a distinction between a confession and an admission in a criminal case for some purposes but that no such distinction or execution is recognized applicable to the rule above stated. The Court also points out the criticism of the rule made by Professor Wigmore, page 686:

“The efficacy of the rule, however, as a shield against the possibility that innocent persons may be convicted of crime on the basis of a false confession or admission induced by promise of immunity or coercion is fully demonstrated by recent decisions. *White v. Texas*, 60 S. Ct. 1032, 84 L.Ed. 1342, decided May 27, 1940; *Chambers v. Florida*, 309 U.S. 227, 60 S.Ct. 473, 84 L.Ed. 716; *Brown v. Mississippi*, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682; *Forte v. United States*, *supra*. If a false confession of guilt may be obtained from an innocent person by the use of coercion or flattery it is equally true that an admission of any element of the crime may also be obtained by the same means. On the principle that it is better for society that the guilty should occasionally

escape than that the innocent should be punished, exceptions should not be grafted upon long-established rules until their need has been clearly demonstrated.

“[8, 9] The rule that to warrant conviction of a crime both confessions and admissions must be corroborated by some independent evidence is illustrated in cases very similar to the present. *Duncan v. United States*, supra; *Gordiner v. United States*, supra; *United States v. Golan*, D.C., Pa., 24 F.Supp. 523; and see *Martin v. United States*, supra; *Tingle v. United States*, supra. Nor has the requirement of some independent proof as applied both to confessions and admissions been relaxed merely because the facts seemed to indicate that the disclosures had been voluntarily made by the accused. If coercion could be clearly shown confessions and admissions would not be admissible at all. *Wilson v. United States*, 162 U.S. 613, 16 S.Ct. 895, 40 L.Ed. 1090; *Hardy v. United States*, 186 U.S. 224, 229, 22 S.Ct. 889, 46 L.Ed. 1137; *Bram v. United States*, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568; *Ziang Sung Wan v. United States*, 266 U.S. 1, 45 S.Ct. 1, 69 L.Ed. 131; *Murphy v. United States*, 7 Cir., 285 F. 801; 22 C.J. 301; 16 C.J. 628, 717.”

A decision of this Court quoted in several of the cases above cited is *Gordiner v. U. S.*, C.C.A. 9th Ct. Jan. 7, 1920, 261 F. 910 where the defendant was convicted of wilfully failing to register under the Selective Draft Act of 1917. On the trial proof was made of statements made by the defendant expressing his age and stating that he was opposed to war and would

not register unless compelled to do so. There were also affidavits introduced made long before.

Held on p. 919:

“In brief the whole case against the plaintiff in error rests upon his affidavits. Unless he was within the prescribed age, he committed no crime by failing to register. The fact that he was subject to registration cannot be established beyond a reasonable doubt by the contents of the affidavits. The judgment is reversed * * *”

In *Martin v. U. S.*, C.C.A. 8th Ct. April 9, 1920, 264 F. 950, defendant was convicted of wilfully transporting spiritous liquor in interstate commerce. Defendant was found with the liquor in his possession and when arrested told the officer he had brought it from another state. He had pleaded guilty in the county court.

Held: The evidence constituted an extrajudicial confession or admission which was not sufficient to authorize a conviction unless corroborated. Citing *Graff v. U. S.*, 257 F. 295; *Naftzer v. U. S.*, 200 F. 494.

We respectfully submit that under the facts as shown and these authorities the motion made by the appellant for a judgment of acquittal should have been granted.

Should we have rested our case at this point? Should we have satisfied ourselves with the comforting thought that the burden of proof never shifts, and that the prosecution must establish its case by proof

so convincing that reasonable minds could not differ as to the guilt of the defendant? We did not elect to do so.

Did the appellant when he took the stand supply any of the proof which had theretofore been lacking? Did any of his witnesses, or any of the documentary evidence do so? Did the prosecution in forcing the defendant to assume the burden of his innocence thereby cleverly cause the defendant to convict himself thereby curing the inadequacy of the plaintiff's case? Above we have reviewed what we believe to be all of the pertinent evidence in the case. Perhaps respondent in its brief will find evidence which we have overlooked. We shall be interested to read it.

As we now understand the facts, the appellant has denied there was any dissolution of the partnership, has shown no fact which would indicate such a dissolution, many facts which give a complete picture of a continuity of business operation and ownership straight through until the years when dissolution actually took place. Other partners have corroborated the fact that nothing occurred in 1941 or at any other time until 1945 to change ANY interest. Minutes of meetings have been offered; written agreements have been introduced; letters inquiring about possible dates of interests have been introduced. All of the evidence showed that when a partner retired he was *then* paid his original investment. All the checks by which such payments were made are in evidence. None of them was issued in 1941, or 1942, or 1943, or 1944. All were

in 1945, 1946 and subsequently—all exactly as Mr. Chan testified and all exactly as his partnership returns filed show.

The case of the prosecution therefore, we submit, was no better at its conclusion than when the prosecution had rested.

In *Nicola v. United States* (C.C.A. 3d Ct., Aug. 9, 1934), 72 F. (2d) 780, the defendant was convicted of income tax evasion. A corporation mostly owned by the defendant had sold certain patents to another corporation, and a third corporation, the Point Improvement Company, of which the defendant was president, had been paid a commisison on this sale. The commission was returned by the Point Improvement Company as income and an income tax paid thereon. The tax payable by Nicola would have been higher and it was the contention of the Government that the defendant had falsely and fraudulently used the device of the corporation to save the difference between the higher and the lower return. The circumstantial evidence upon which the case was permitted to go to the jury in the *Nicola* case was not dissimilar to the circumstantial evidence upon which the prosecution relies in this case. In reversing the verdict and judgment of conviction and holding that the evidence was insufficient to justify a conviction, the Circuit Court of Appeals said, on page 786:

“ ‘Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and

where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction.' *Union Pacific Coal Co. v. United States*, 173 F. 737, 740 (C.C.A. 8); *Wiener v. United States*, 282 F. 799, 801 (C.C.A. 3); *Yusem v. United States*, 8 F. (2d) 6 (C.C.A. 3); *Ridenour v. United States*, 14 F. (2d) 888 (C.C.A. 3)."

BALANCE SHEETS PREPARED TO SHOW INCOME TAX EVASION BY THE SO-CALLED "NET-WORTH EXPENDITURES" METHOD CAN ONLY BE USED WHEN THE TAXPAYER'S BOOKS AND RECORDS HAVE BEEN LOST OR ARE INADEQUATE.

In the preparation of this case and this brief, appellant's counsel have examined many tax evasion cases (not all of which are relevant on their facts), and many cases where the so-called "net worth-expenditures" method has been used and discussed.

This method may be described briefly. The agent goes to the taxpayer and asks him to state at the beginning of the period what are his "cash on hand", "accounts receivable", "equipment", "inventory", in other words, his assets, and also what his liabilities are at the beginning of the period. Human nature being what it is, it is not probable that the unwary taxpayer at that point overstates his assets. Then the taxpayer is asked the same questions for each year of the period and is particularly questioned concerning his expenditures for, and acquisition of, assets. In this way the net worth and increase of net worth

is determined during each of the years, and by deduction and subtraction net income during each of the years is determined.

Now it is obvious that where there is a set of books showing the taxpayer's receipts and disbursements all during the period, this method, which is never any more accurate than the memory of the agent plus the memory of the taxpayer, is neither necessary nor proper. Where profit and loss statements can be prepared by an accountant the true and proper proof of income is through a profit and loss statement.

In many tax evasion cases it became impossible to create profit and loss statements, either because the taxpayer had never kept any books, or because his books were "phoney" or because they had been destroyed purposefully or otherwise. Almost invariably the early—and some later—tax evasion cases involved bootleggers, gamblers, gangsters and similar characters to whom the idea of books accurately reflecting their transactions was quite abhorrent.

So the "net worth-expenditures" method of proving income tax evasion became, as a matter of necessity, a means of bringing miscreants to justice where no other method could be used.

But its use is and must be limited to those cases where its use is necessary.

The prosecution apparently recognized, or at least paid lip service to this limitation in the testimony of Mr. Englund.

“A. We only use the net worth system when the taxpayer's books and records are inadequate and we are unable to interpret them because they lack information as to * * * certain figures.”

(R-2 p. 168, lines 1-4.)

In our statement of fact (*supra*, pp. 43, 48, 59 through H-10) we have shown the facts regarding the adequacy of the appellant's books in some detail.

The picture shown by this evidence is one of a complete set of “single entry” books recording each day's transactions, all receipts and disbursements, all throughout this period. There are daily records in English and Chinese which between them are complete. All of them were handed over to the special agents of the government, and kept by them for a year. Mr. Chan admittedly offered every cooperation in aiding the government to understand them. The books are now in evidence and are before this Court. There is nothing haphazard about the way the books are kept nor any of the columns therein. They were fully explained at the trial. Each debit column is always in the same place, each credit column, likewise. Mr. Englund attributed the failure of the government agents, during the year when these records were in their possession, to use them, to the fact that the Chinese interpreter, Mr. Victor Chin, couldn't speak the dialect in which the books are written.

This preposterous statement is the most significant single fact in this case.

We have shown above that there is only one Chinese written language common to all spoken dialects. Mr. Victor Chin simply could not have made that preposterous statement to Mr. Englund.

He sat in the courtroom all during the trial to counsel the prosecution. He translated all of the letters and written agreements which the defendant introduced into evidence (presumably without any difficulty arising from dialect differences). He was not called as a government witness to confirm the fact that he could not read the Chinese books. As a matter of fact, he did read passages from them during the trial without any difficulty whatever.

How much credence can be given to the testimony of a person when relating what he claims the appellant told him either about the existence of a partnership or the true extent of his assets, when he makes such an assertion?

Not only were the daily transactions complete through these records, there were cancelled checks, absolutely complete excepting for one or two checks readily picked up by the bank statements which were also complete. All are now in evidence.

There wasn't a single missing receipt or disbursement.

Moreover, the appellant had an audit made by an accountant and this audit was given to the special agents. Not one relevant fact was given at the trial by anyone as to wherein the books and records of

the appellant failed to furnish the government with the information sufficient for the preparation of a statement showing the ACTUAL income which the appellant had received and all of his expenditures during all of this period.

From all the evidence before it the special agents of the Internal Revenue Department could have prepared profit and loss statements.

True, the special agent Englund testified to the conclusion that the "books were inadequate" but as shown, the "reasons" he ascribed were not reasons at all; they were excuses for the more convenient—the simpler method of attempting to set up a balance sheet on extra-judicial admissions, after the introduction of which *let the taxpayer prove himself innocent, if he can!*

The question then is this:

Where a small business using a single-entry system of recording its financial transactions, parts of which are in a foreign language, keeps full books and records and turns them over to the special agents of the Internal Revenue department, and offers full cooperation in the investigation of these financial affairs, may the special agents of the prosecution disregard such books completely and present its case solely upon a net worth-expenditures theory basing the balance sheets "built" thereunder wholly upon the claimed extrajudicial statements of the taxpayers, thus forcing the taxpayer to attempt to explain by

trying to make a jury of lay men understand wherein the plausible picture built up on conjecture, is wrong?

If the answer to this question by this Court is to be in the affirmative, then indeed the prosecution of cases of income tax evasion has reached a new and dangerous stage in its development threatening the very foundations of the constitutional rights of an accused.

THE NET WORTH-EXPENDITURES METHOD CANNOT BE USED WHERE THE BEGINNING NET WORTH IS BASED WHOLLY UPON EXTRAJUDICIAL ADMISSIONS OR IS OTHERWISE UNSUBSTANTIAL.

We have shown above that the balance sheets prepared and submitted by the prosecution here were built without substantial exception upon hearsay—the statements which Mr. Englund said that the appellant had said to him were his assets. We have shown that the beginning net worth statement was almost wholly erroneous.

The cases which we have cited above to show that no criminal case can rest solely upon extrajudicial admissions (*supra*, pp. 95-111) are also authority for the same proposition that beginning net worth can not be so proven. Tax evasion cases are no different than other criminal cases.

The following cases are in point to the effect that a beginning net worth balance sheet being the foundation upon which all the rest of the net worth statements depend must be based upon solid fact.

In *United States v. Chapman* (C.C.A. 7th Ct., June 18, 1948), 168 F. (2d) 997, the defendant was convicted of income tax evasion for the year 1943. The Appellate Court found that the balance sheet created by the agents for the beginning of the period, i.e., December 31, 1942, had been taken from and was based upon the books and records furnished by the taxpayer (thus in that case they did not have the situation as we do here where the beginning balance sheet and "net worth" is taken wholly from the statements made by the taxpayer).

There is in this case an excellent statement by the Court, however, of the requisites of the beginning net worth statement. The Court says, on pages 1001 and 1002:

"Appellant contends that, 'In a "net worth case," the starting point must be based upon a solid foundation and a Revenue Agent's statement of the defendant's oral admission or confession when uncorroborated is not sufficient to convict.' We fully agree with this statement of the law. However, we find no deviation from it in this case. The actual starting point here was the net worth as established by appellant's books and records. From these Loyd drew up a statement of appellant's assets and liabilities as of January 1, and December 31, 1942. According to his testimony, he showed these to appellant on at least two occasions and asked him if he had any other assets or liabilities, and appellant replied that those were all he had, and, upon specific inquiry as to whether he had any currency, cash on hand, besides an item of \$2,375

entered on his books, he replied that the records were substantially correct as to that, and he had no other cash with the exception of a little money in his pocket. We cannot agree with appellant's designation of this as an 'uncorroborated admission.' In the first place, we think the Government was entitled to expect that books furnished for examination into a taxpayer's fiscal affairs would be correct, and a verification of their accuracy can scarcely be called an 'uncorroborated admission.' ”*

Another recent case is *Bryan v. United States* (1949), C.C.A. 5th Ct., 175 F. (2d) 223. Certiorari was granted by the United States Supreme Court in 338 U.S. 813, 70 S. Ct. 69, and we have not read the decision of that Court. The Circuit Court opinion shows the following: the indictment charged income tax evasion. The government, using the net worth-expenditures method, showed by 50 witnesses and documentary proof expenditures greatly in excess of the income reported. There were no books to rely upon. The evidence also showed capital assets increasing each year in proportion to the expenditures in excess of gross receipts reported. The government's beginning net worth was a nominal figure.

It was held that the beginning net worth was not accurately ascertained, that the "net worth-expenditures" method is only effective where the computations of beginning net worth at the beginning and

*Is the government also entitled to expect that the books will be incorrect?

at the end can be accepted as being reasonably accurate.

Whatever may have been the proper application of the facts of that case to the rule stated, the rule itself is sound and has been settled.

In *United States v. Fenwick* (C.C.A. 7th Ct., Nov. 4, 1949), 177 F. (2d) 488, Helen J. Fenwick was convicted in the United States District Court, Southern District of Indiana, of income tax evasion for the years 1943 and 1944. At the trial the Government offered no evidence other than a "net worth-expenditures" balance sheet to show the evasion of income taxes. The Court says, page 489 and 490:

"[1, 2] In such a situation we must keep in mind that the conviction can not stand unless there is proof of the corpus delicti, existence of which can not be presumed or established by an extrajudicial admission. The government must, by competent evidence, prove beyond reasonable doubt that the crime charged has actually been committed. *Pines v. United States*, 8 Cir., 123 F.2d 825, 829; *Forte v. United States*, 69 App. D.C. 111, 94 F.2d 236, 243, 127 A.L.R. 1120; *Gordiner v. United States*, 9 Cir., 261 F. 910, 912; *United States v. Chapman*, 7 Cir., 168 F.2d 997 at page 1001. In the latter case we said: 'Appellant contends that, "In a 'net worth case,' the starting point must be based upon a solid foundation and a Revenue Agent's statement of the defendant's oral admission or confession when uncorroborated is not sufficient to convict.'" We fully agree with his statement of the law.' In other words to justify the conviction, there must

be proof beyond reasonable doubt and exclusive of any express or implied extrajudicial admission by defendant, that defendant evaded some income tax. *Gleckman v. United States*, 8 Cir., 80 F.2d 394, 399; *United States v. Miro*, 2 Cir., 60 F.2d 58, 61; *O'Brien v. United States*, 7 Cir., 51 F.2d 193, 196. Inasmuch as there is no direct proof that defendant received income which he did not report, we must test the validity of his conviction by the rules enunciated in the cases cited to determine whether there is such proof of increase in net worth, irrespective of defendant's implied admissions out of court, as to justify a finding of guilt. Such proof, circumstantial in character, in view of the principles announced, must be such as will exclude every reasonable hypothesis except that of guilt. Evidence of mere probability of guilt, of course, is not sufficient."

The Court then proceeded to review the evidence in that case and showed that the Government's information as to beginning net worth was based entirely upon an examination of defendant's "cancelled checks, bank statements and miscellaneous memoranda." The Court says, on pages 490 and 491:

"[3] The weakness of the government's position, stressed by defendant, is the uncertainty of the propriety of the finding of defendant's net worth at the beginning of 1943. Of course, before the increased net worth method of proof is effective, the net worth of the taxpayer at the beginning of the tax year must be clearly and accurately established by competent evidence. *Bryan v. United States*, 5 Cir., 175 F.2d 223;

United States v. Chapman, 7 Cir., 168 F.2d 997, 1001; United States v. Skidmore, 7 Cir., 123 F.2d 604, 608. By this rule we must test the sufficiency of the evidence offered by the government to establish defendant's net worth at the beginning of 1943.

* * * * *

“* * * the evidence falls far short of proof that the property which the government agents assumed constituted all of defendant's net worth at the beginning of 1943, was in fact all of the property then owned by him. * * *

“[4] As we have said, when the government relies upon the circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion it must produce evidence that excludes all possible available sources of taxable income from which the increased net worth and the excess expenditures could have been derived. Thus in *Bryan v. United States*, 5 Cir., 175 F.2d 223, 225, the court said: ‘The net worth expenditures method of establishing net income, sought to be applied in this case, is effective only if the computations of net worth at the beginning and at the end of the questioned periods can reasonably be accepted as accurate. Since * * * no claim of evasion is based upon the deductions from gross income reported by the Defendant, and since there is no evidence that the gross expenditures by the Defendant in any year were made entirely from gross income of the business operations in such year, it was essential for the Government to present evidence that excluded, or tended to exclude, all other available sources from which the additional funds

expended could have been derived. If the Defendant correctly reported his gross income, then a very substantial part of the expenditures was obliged to have been made from funds other than such current income and from sources not covered by the returns or the records of the Defendant or included by the Government's computation of net worth. * * * the Government must rely almost entirely upon circumstantial evidence, that is to say, upon the circumstance of the expenditure of considerably more money in the years in question than the Defendant took in * * *. The evidence, being circumstantial, must exclude every reasonable hypothesis other than the guilt of the Defendant. * * * the case should not have been submitted to the jury since it did not exclude the hypothesis that the funds used in making some of the expenditures might have been from sources other than current business income.' This supports the decision of this court in *United States v. Chapman*, 7 Cir., 168 F.2d 997, 1001."

In this case, special agent Englund proceeded to go right down the list of all assets and liabilities stated in his balance sheet, and excepting where the appellant had stipulated to facts, the figures were based wholly upon hearsay (*supra* pp. 49-57).

In *United States v. Fenwick* (C.C.A. 7th Ct., Nov. 4, 1949), 177 F. (2d) 488, discussed *supra*, the Court further said on p. 492:

"Remembering that the government has the burden of proof in a criminal case, that the burden never shifts to defendant, that circum-

stantial evidence must be of such character as to exclude every reasonable hypothesis except that of guilt, it necessarily follows that, when the government relies upon circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion, the basic net worth must be established. The defendant is not compelled to take the witness stand; he is not compelled to make proof that he is innocent, but he must be proved guilty by the evidence beyond all reasonable doubt, and where there is uncertainty as to whether all the assets of defendant are included in the government's computation of net worth, it follows that its computations can not be relied on. Essential proof of no other assets is the cornerstone of the evidence of the government; that cornerstone being faulty, the whole edifice is so weakened as to be undependable as proof of guilt beyond all reasonable doubt."

CONCLUSION.

The appellant was on trial for income tax evasion. The methods by which a conviction was sought and obtained have been subjected to critical analysis above. One further criticism has been reserved for this conclusion.

Repeatedly throughout the trial the suggestion was put before the jury that Mr. Chan had been guilty of black market operations.

In cross-examining the witness Swanston, Mr. Seawell said:

“Q. Would it affect your testimony if you had known he was investigated by the OPA for charging over ceiling prices? Would that affect your testimony—during the years 1943-'44? * * *

In other words, it wouldn't make any difference to you as to his reputation for truth, honesty and integrity if he did charge overceiling prices? Is that correct?

Mr. Pierce. I presume counsel is going to have evidence to back this up. Otherwise the statements are highly prejudicial.

The Court. That wouldn't be relevant.”

(R-2 p. 354, lines 5-15.)

“Mr. Seawell. Q. Isn't it a fact that at that time you told him (Mr. Englund) that the \$8,100.00 was included as it was in your return, you put it in the merchandise bought for sale, because you had been paying overceiling payments, and that is the way you desired to cover it up? Isn't that what you told Mr. Englund the first time he came in to see you, when you first saw him?

A. No, no.

Q. Didn't you tell him you had been buying over the ceiling and that is the only way you could cover it up?

A. No, I never did tell him that, sir.

Q. Or words to that effect, you told him you put it in there to cover the over ceiling payments?

A. No, I never told him * * * nothing like that.

Q. And didn't you have some conversation with him about buying over the ceiling?

A. No sir.

Q. You did buy over the ceiling?

A. No, sir.

Q. During the years 1943, 1944, 1945, and 1946 you were in the meat business, weren't you?

A. Yes, sir.

Q. Didn't you make offers to people in Sacramento to buy meat over the ceiling prices?

A. No, sir.

Q. Never did?

A. Never did.

Q. Are you sure of that?

A. Sure of that, yes."

(R-3 p. 646, line 22 to p. 647, line 25.)

To the witness Robinson:

"Mr. Seawell. Q. Did you ever hear that Jack Chan was engaged in black market operations in Sacramento?

A. No I never.

Q. Did you know that he was selling meat over the ceiling price?

A. No.

Q. Did you ever hear that he offered to buy meat from a number of persons in Sacramento for overceiling prices * * *" etc.

(R-3 p. 971, lines 12-21.)

There was not the slightest evidence in this record that Mr. Chan had been guilty of black market operations. No evidence was introduced, or attempted to be introduced that he had ever told anyone he had bought or sold overceiling. This was a deliberate attempt by the prosecution to arouse the jury's prejudice.

We realize that we did not object to these questions when they were asked. What good would it have done? The suggestion was before the jury when the question was asked; the answers were not damaging. No question of that kind can be recalled by objection sustained, or admonition. The objection but serves to emphasize the importance of the subject in the jury's minds.

The matter was urged on motion for new trial. Perhaps we should have demanded a mistrial.

Perhaps, on the other hand these questions and answers are not sufficient in and of themselves to justify a reversal upon appeal.

However, we believe that when this is added to the other facts now before this Court, they become highly significant.

One other factor should be mentioned in closing:

This case was tried over a period of nearly a month. Early in the trial the prosecution started to superimpose upon a black board the set of figures which are now in its Plaintiff's Exhibit 39. Later this same computation was handed to each juror and retained throughout the trial. Thus the jurors had this one piece of evidence before them to take home with them and to study—this one bit to the exclusion of all other items of evidence—for a period of twenty days.

True, following the precepts of the prosecution we prepared similar balance sheets and presented them during the latter days of the trial. But by that time

the following figures among others were indelibly fixed in the jury's minds.

Jack Chan's net worth 12/31/42 minus \$762.78.

Jack Chan's net worth 12/31/46 \$83,113.11.

Appellant tried to assume the burden—a burden which under the law he is not rightfully required to assume—of proving to a moral certainty and beyond all reasonable doubt that he was innocent.

He tried hard to assume that burden over a period of twenty days, while the trial was twice interrupted—once when a relative of one of the jurors, died, once while another juror simply walked out of the court—room and we stipulated to a verdict by eleven jurors.

We tried to make the jury understand all of the books and records and all the rather technical accounting matters. We put these books in evidence with whatever translations were necessary. We got them in evidence only over the strenuous objection of the prosecution.

We do not believe that the jury ever understood the books or the somewhat complicated testimony of the experts who tried to explain them. After months of study we have found it difficult to keep all of the details in mind ourselves.

We believe that the appellant in this case was not convicted of income tax at all; we believe he was convicted, first, of being a Chinaman, secondly, of having profited by black market operations, and thirdly of

failing to pay income tax on moneys overdrawn from the partnership.

We do not believe that the jury believed that the partnership had been dissolved. The evidence of such dissolution was too shadowy for credence. We don't believe that the jury cared whether the partnership had been dissolved in 1941 or 1948 or at all. We sincerely believe that all the jury ever saw after this long protracted trial was \$83,113.31 of "net worth" in 1946.

And we strenuously contend that the reason why the jury got that erroneous and distorted picture is because the prosecution here was permitted to and did present a plausible but false case built entirely upon hearsay—a case which the painstaking presentation of facts could never break down.

Dated, Sacramento, California,
September 25, 1950.

Respectfully submitted,
MULL & PIERCE,
A. M. MULL, JR.,
F. R. PIERCE,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

Defendants' Exhibit AA

PALACE MARKET

BALANCE SHEET

For Years 1942 thru 1946

	<u>12-31-42</u>	<u>12-31-43</u>	<u>12-31-44</u>	<u>12-31-45</u>	<u>12-31-46</u>
Assets					
Cash on Hand	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00
Cash in Safe	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00
Cash in Bank					
Merchants Nat'l #1	550.32	1,775.21	245.49	5,051.99	6,438.10
" " #2	29.26	3,550.74	426.53	1,449.76	3,263.62
Capital National		4,040.71	1,264.57	2,794.28	3,591.52
Accounts Receivable	500.00	500.00	500.00	500.00	500.00
Inventory	500.00	500.00	2,500.00	1,000.00	1,000.00
Equipment	500.00	706.03	1,478.25	1,478.25	3,096.28
Clearing Account (Other Partners)		937.73	1,558.30	2,209.99	2,589.23
Clearing Account (Jack Chan)		1,806.08	19,734.81	27,073.13	36,058.80
TOTAL ASSETS	<u>5,079.58</u>	<u>16,816.50</u>	<u>30,707.95</u>	<u>44,557.40</u>	<u>59,537.55</u>
Liabilities					
Clearing Account (Jack Chan)	4,658.24				
Back Wages	8,100.00				
Hip Hing Co.	300.00				
TOTAL LIABILITIES	<u>13,058.24</u>				
Net Worth	<u>*[7,978.66]</u>	<u>16,816.50</u>	<u>30,707.95</u>	<u>44,557.40</u>	<u>59,537.55</u>
		<u>*[7,978.66]</u>	<u>16,816.50</u>	<u>30,707.95</u>	<u>44,557.40</u>
INCREASE FOR YEAR		<u>24,795.16</u>	<u>13,891.45</u>	<u>13,849.45</u>	<u>14,980.15</u>
Less Depreciation		<u>70.00</u>	<u>147.83</u>	<u>147.83</u>	<u>309.63</u>
TAXABLE INCOME OF PALACE MARKET (Exclusive of Partners Salaries)		<u>24,725.16</u>	<u>13,743.62</u>	<u>13,701.62</u>	<u>14,670.52</u>
Beginning Net Worth 1-1-43				deficit	7,978.66
Ending Net Worth 12-31-46					59,537.55
TOTAL INCREASE IN NET WORTH					<u>67,516.21</u>

*Brackets Indicate a Negative Balance.

Defendants' Exhibit BB

JACK CHAN***BALANCE SHEET FOR INCOME TAX PURPOSES****For Years 1942 thru 1946**

	<u>12-31-42</u>	<u>12-31-43</u>	<u>12-31-44</u>	<u>12-31-45</u>	<u>12-31-46</u>
Assets					
Accounts Receivable	3,600.00	3,600.00	3,600.00	4,100.00	500.00
War Bonds	243.75	1,350.00	412.50	412.50	412.50
Auto	450.00	1,100.00	1,100.00	1,100.00	1,100.00
Personal Jewelry	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00
Life Insurance (Cash Value)	4,172.62	4,172.62	4,172.62	4,172.62	4,172.62
Motion Picture Equipment					62.30
Home Furnishings	500.00	705.00	980.83	980.83	980.83
Home		6,767.42	6,767.42	6,767.42	6,767.42
Lot			100.00	100.00	100.00
Improvements on Lot			251.20	251.20	251.20
Building			57,724.43	57,724.43	57,724.43
Improvements on Buildings			644.00	644.00	1,238.00
Back Wages for Part- nership	8,100.00				
Clearing Account for Partnership	4,658.24				
Equity in Partnership		3,249.30	5,998.02	9,012.38	20,841.00
Total Assets	22,724.61	21,944.34	82,751.02	86,265.38	95,712.10
Liabilities					
J. B. Johnson	1,000.00				
Cal West States Life Ins Co.	2,975.68				
Minn Mutual Life Ins Co.	1,196.94				
Deficit in Partnership	1,695.73				
Amount Due to Partner- ship		1,806.08	19,734.81	27,073.13	36,051.00
Note Pay. Wm K Sherman			35,000.00	25,000.00	20,000.00
Total Liabilities	6,868.35	1,806.08	54,734.81	52,073.13	56,051.00
Net Worth, Jack Chan	15,856.26	20,138.26	28,016.21	34,192.25	39,661.10
		15,856.26	20,138.26	28,016.21	34,192.25
Net Worth Increase		4,282.00	7,877.95	6,176.04	5,468.85
Beginning Net Worth 1-1-43	15,856.26				
Ending Net Worth 12-31-46	39,656.43				
Total Increase in Net Worth	23,800.17				

Defendant's Exhibit CC

JACK CHAN**COMPUTATION OF NET INCOME PER NET WORTH THEORY
USING PALACE MARKET BALANCE SHEET AS A BASIS****For the Years Indicated**

	<u>1943</u>	<u>1944</u>	<u>1945</u>	<u>1946</u>
able Income of Palace Market	24,725.16	13,743.62	13,701.62	14,670.52
ack Chan's Partnership Ratio	50/250	50/250	55/250	195/250
ack Chan's Share of Profit	4,945.03	2,748.72	3,014.36	11,443.01
n's Salary as a Partner	1,800.00	4,260.00	4,260.00	4,260.00
income from Building		11.09	3,075.63	3,453.49
orrected Personal Income	<u>6,745.03</u>	<u>7,019.81</u>	<u>10,349.99</u>	<u>19,156.50</u>
Less Amount Trfd to Wife	3,372.51	*	5,174.99	9,578.25
band's Share (Jack Chan)	3,372.52	7,019.81	5,175.00	9,578.25
orted on Income Tax Return	<u>3,384.00</u>	<u>4,912.89</u>	<u>5,805.63</u>	<u>7,349.09</u>
al Income per Net Worth Theory				25,145.58
al Income Reported per Income Tax Returns				<u>21,451.61</u>
Unreported Difference				3,693.97

Joint Return filed for 1944.

No. 12,596

IN THE
United States Court of Appeals
For the Ninth Circuit

CHAN SHING Ho, also known as Jack
Chan,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States
for the Northern District of California.

BRIEF FOR THE UNITED STATES.

FILED

NOV - 6 1950

PAUL P. O'BRIEN,

CLERK

FRANK J. HENNESSY

United States Attorney,

EMMET J. SEAWELL,

Assistant United States Attorney,

J. RICHARD JOHNSTON,

Special Attorney, Bureau of Internal Revenue,

Attorneys for Appellee.

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No. 12,596

IN THE

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Appellee.

On Appeal from the District Court of the United States
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BRIEF FOR THE UNITED STATES.

**A STATEMENT OF THE PLEADINGS AND FACTS DISCLOS-
ING THE BASIS UPON WHICH IT IS CONTENDED
THAT THE DISTRICT COURT HAD JURISDICTION
AND THAT THIS COURT HAS JURISDICTION TO RE-
VIEW THE JUDGMENT IN QUESTION.**

The appellant, Chan Shing Ho, also known as Jack Chan, was indicted on November 7, 1949, in the District Court for the Northern District of California, Northern Division, as follows:

Count One—for willfully and knowingly attempting to evade and defeat his personal income and victory taxes in the amount of \$2,343.26 for the calendar year 1943, in violation of Section 145(b), Internal Revenue Code, 26 U.S.C., Section 145(b);

Count Two—for willfully and knowingly attempting to evade and defeat his personal income taxes and those of his wife in the amount of \$4,185.78 for the calendar year 1944, in violation of Section 145(b), Internal Revenue Code, 26 U.S.C., Section 145(b);

Count Three—for willfully and knowingly attempting to evade and defeat his personal income taxes in the amount of \$776.23 for the calendar year 1945, in violation of Section 145(b), Internal Revenue Code, 26 U.S.C., Section (145(b);

Count Four—for willfully and knowingly attempting to evade and defeat his personal income taxes in the amount of \$3,109.90 for the calendar year 1946, in violation of Section 145(b), Internal Revenue Code, 26 U.S.C., Section 145(b). (R-1 pp. 1-4.)

On November 28, 1949, the defendant entered a plea of not guilty to each count of the indictment. Trial was had in the District Court and on April 20, 1950, the jury returned a verdict finding appellant guilty on each count of the indictment. (R-1 p. 6.) On May 8, 1950, the District Court committed appellant to the custody of the Attorney General for a period of one year and one day and sentenced him to pay a fine in the amount of \$7,500 on the first count of the indictment and further sentenced him to imprisonment of one year and one day on each of the second, third, and fourth counts of the indictment, the periods of imprisonment imposed on Counts Two, Three, and Four to commence and run concurrently with the period of imprisonment imposed on Count One. (R-1 pp. 10, 11.) The Court further

ordered that the defendant be admitted to bail, pending notice of appeal, in the sum of \$10,000, and that he be granted a twenty-four hour stay of execution.

Upon conclusion of the case of the prosecution defendant made a motion for a judgment of acquittal, which was denied by the trial Court. On April 25, 1950, defendant filed a motion for a new trial, which was likewise denied. (R-1 p. 7.)

Notice of appeal was filed on May 10, 1950. (R-1 pp. 12-14.)

STATUTE INVOLVED.

Title 26, Internal Revenue Code: Sec. 145.

PENALTIES

* * * * *

(b) Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE, PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

Appellant was convicted of willfully and knowingly attempting to evade and defeat a large part of his individual income taxes by filing false and fraudulent returns with the Collector of Internal Revenue for each of the years 1943, 1944, 1945, and 1946. During all of those years, and for many years theretofore, appellant had operated a retail meat market known as the Palace Market at 816 "J" Street, Sacramento, California.

For each of the years 1943 to 1946, inclusive, appellant filed partnership income returns for the Palace Market, reporting the income of the business as partnership income (and, incidentally, understating such income), and he filed individual returns reporting as his individual income only a part of the alleged partnership income. The evidence clearly established, however, that no partnership was in existence during those years. The taxpayer admitted to the investigating agents that the partnership had terminated in 1941; alleged partners testified that they had understood that they were no longer partners after 1941; and strong circumstantial evidence established the non-existence of a partnership. Appellant, however, used the partnership device to evade the taxes owing on his income from the Palace Market.

Both the prosecution and the defense computed the appellant's true income during the years 1943, 1944, 1945, and 1946 on the basis of his increase in

net worth, the principal point of difference being that the defense assumed the existence of a partnership whereas the prosecution did not. Many of the other points of apparent difference between the figures of the prosecution and those of the defense were of no significance in determining income since the figures remained constant throughout the period, causing neither an increase nor a decrease in appellant's net worth. This was demonstrated when one of appellant's expert witnesses, testifying on cross-examination, constructed net worth statements, using appellant's figures for the various assets and liabilities but assuming that there was no partnership. These statements showed an even greater increase in net worth than that claimed by the Government.

Evidence presented in support of the various items of net worth consisted of cancelled checks, stipulations between counsel, and admissions of appellant.

QUESTIONS PRESENTED IN THIS CASE.

(1) When appellant elected to proceed with the presentation of evidence did he thereby waive his motion for a judgment of acquittal made at the close of appellee's evidence?

(2) Is the evidence sufficient to support the verdict?

(3) Should this Court review the action of the trial Court in denying appellant's motion for a new trial?

(4) Did the trial Court err in admitting the testimony of the investigating agents as to the admissions of appellant that no partnership existed during the period 1943-1946?

ARGUMENT.

I.

WHEN APPELLANT ELECTED TO PROCEED WITH THE PRESENTATION OF EVIDENCE HE THEREBY WAIVED HIS MOTION FOR A JUDGMENT OF ACQUITTAL MADE AT THE CLOSE OF APPELLEE'S EVIDENCE.

The law on this point is too clear to require extended argument. When a defendant offers evidence in a criminal prosecution he thereby waives his motion for a judgment of acquittal made at the close of the evidence offered by the prosecution, and *that motion need not be considered on appeal. Mosca v. United States*, 174 F. (2d) 448 (C.C.A. 9th), and cases cited therein at p. 451.

II.

THE EVIDENCE IS MORE THAN SUFFICIENT TO SUPPORT THE VERDICT.

A

The evidence is sufficient to support the verdict even assuming the existence of a valid partnership as claimed by appellant.

There are two elements to the offense of attempted tax evasion: (a) The existence of a substantial tax deficiency, and (b) Willfulness. As to the first ele-

ment, while the prosecution's computations of tax liability were premised upon the nonexistence of a partnership during the years 1943, 1944, 1945, and 1946, the evidence also showed that the appellant had a substantial tax deficiency *even assuming the existence of a valid partnership as reported in the returns filed by the appellant*. Specifically, the evidence showed the following to be true:

Year	Actual Net Income of Palace Market	Net Income of Palace Market per Partnership Returns
1943	\$22,210.29	\$ 9,195.08
1944	17,506.23	3,207.25
1945	14,356.37	5,828.01
1946	30,711.09	5,464.97
Total	<hr/> \$84,783.98	<hr/> \$23,695.31

Since the total income of the business was understated on the partnership returns which the appellant personally prepared and filed, the distributive share which he reported as his individual income was likewise understated. In fact, the accounting evidence presented by appellant himself showed an understatement of income of \$3,693.97. (Appellant's Exhibit CC.)

Considering the case on this basis, the filing of false returns would itself support an inference of an affirmative attempt to evade taxes without further evidence of willfulness. In the leading case of *Spies v. United States*, 317 U.S. 492, 499, 63 S.Ct. 364, 368, the Court said:

* * * By way of illustration, and not by way of limitation, we would think affirmative willful

attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal * * *

Another type of conduct from which affirmative willful attempt may be inferred is the filing of a return from which income is intentionally omitted. *Gaunt v. United States*, F. (2d) (C.C.A. 1st), decided July 28, 1950 (1950 P-H, par. 72,664); *United States v. Croessant*, 178 F. (2d) 96 (C.C.A. 3rd); *Myres v. United States*, 174 F. (2d) 329 (C.C.A. 8th); *Cave v. United States*, 159 F. (2d) 464 (C.C.A. 8th).

It is thus clear that even assuming the existence of a valid partnership the evidence supported the verdict.

B

The evidence clearly shows that no partnership existed during the years 1943, 1944, 1945, and 1946.

In determining whether the evidence is sufficient to support the verdict and sustain the judgment of conviction this Court should consider the evidence most favorably to the prosecution, indulging all reasonable presumptions in support of the trial Court's rulings and drawing all inferences permissible from the record. *Pasadena Research Laboratories v.*

United States, 169 F. (2d) 375 (C.C.A. 9th), certiorari denied, 335 U.S. 853, 69 S.Ct. 83; *Henderson v. United States*, 143 F. (2d) 681 (C.C.A. 9th).

The evidence clearly supported a finding that no partnership was in existence during the years 1943 to 1946, inclusive, but that the defendant nevertheless reported the income of the Palace Market for those years on a partnership basis for the purpose of evading taxes. The appellant's admissions, the testimony of other partners and the circumstantial evidence were consistent on this point.

Notwithstanding the fact that he may have made ambiguous or even conflicting statements as to the existence of a partnership, the defendant clearly admitted to the investigating agents that he had enjoyed exclusive ownership of the business, at least from 1943 on. Special Agent Englund testified that the defendant had told him that the partnership was discontinued in 1941 (R-2 p. 99, line 25 to p. 100, line 3), and that he had said, "* * * Business all mine since 1941," (R-2 p. 145, lines 21-23). Further, there was introduced in evidence as Plaintiff's Exhibit 40 the transcription of a statement made by the defendant under oath on January 19, 1948, in which he said, "* * * 1940 I went back to China and then '41 all partners everybody dropped out of business. Nobody wanted to stay in business. Too many bills, and then I take them all. * * *"

The testimony of the other alleged partners who testified at the trial likewise supports the conclusion

that no partnership existed during the period in question.

Henry Chan, who was called as a witness by appellant, testified that he talked with the taxpayer about the middle of 1939 about withdrawing from the partnership, and that it was thereafter his understanding that he had withdrawn as a partner. (R-3 pp. 799-801.)

George Chan, who was also called by appellant, testified on direct examination that he had signed a written agreement in 1945 (Deft's. Ex. Z) transferring to the taxpayer all of his interest in the partnership in consideration of the sum of \$500 (R-3 pp. 808-811). On cross-examination George Chan proved to be a reluctant, almost a belligerent, witness. The prosecution impeached his testimony by introducing in evidence a written transcript of a question-and-answer statement made by the witness during the course of the investigation (Pltf's. Ex. 43) in which he had stated that the partnership was terminated in 1941 and that he was a partner from 1927 to 1941 only.

Harry Young, the third and last alleged partner to testify, was called as a witness on rebuttal by the Government. The defense had previously introduced in evidence the Chinese original and an English translation of a letter supposedly written by him to the taxpayer in 1947 proposing to withdraw from the partnership and requesting the return of his \$500 investment. (Deft's. Ex. K.) Mr. Young's command

of spoken English was not too good and it was not always possible to tell whether he understood the question he was asked on the stand. However, he did testify definitely that he thought he was out of the partnership in 1941. (R-3 p. 839, lines 9-22.) He also testified that the letter (Deft's. Ex. K) had been written for him by a friend, that he himself had not signed it, and that he had not even read it after it was written (R-3 p. 840).

Not only do the admissions of appellant and the testimony of the alleged partners refute the claim that a partnership existed during the years 1943, 1944, 1945, and 1946, but strong circumstantial evidence points to the same conclusion. The taxpayer conducted the Palace Market business exactly as if it were wholly owned by him: He managed the store and signed all checks, except when he was in China in 1940 (R-3 p. 586, p. 667, line 23 to p. 668, line 2); although the business was highly profitable during the years under consideration, he distributed no profits to any of his alleged partners (R-2 p. 538, lines 17-19; R-2 p. 539; R-3 p. 597, lines 10-13; R-3 p. 599, lines 1-3; R-3 p. 615, lines 12, 13) and did not even tell the alleged partners that there were profits to be distributed. (R-2 p. 534, lines 9-21; R-3 p. 667, lines 19-22.)

Appellant introduced in evidence as Defendant's Exhibit F the Chinese original and an English translation of a partnership agreement executed on September 8, 1923, and allegedly still in effect during

the period from 1943 to 1946. This agreement contains the following provisions, among others:

7. A financial statement of the company should be sent to each partner at the end of each year.

* * * * *

11. Twenty percent of any profits earned in the year should be distributed as bonuses, the remaining eighty percent could be either distributed among the partners or be kept in the company for expansion purpose as seen fit by partnership meeting—procedure followed as of article number 6.

Appellant admitted upon cross-examination, however, that he had not complied with either of these provisions. (R-3 p. 748, line 11 to p. 750, line 3.)

Appellant also introduced in evidence as Defendant's Exhibit H the Chinese original and an English translation of the minutes of a partnership meeting allegedly held on October 20, 1940, and attended by appellant. According to these minutes the following decisions, among others, were made:

A partnership meeting should be called on the 1st week of the 4th month of every year.

A financial statement should be issued every spring. Chan Tien Kwei seconded.

* * * * *

As of today no partners are allowed to borrow money. All merchandise purchased on credit must be paid in full at the end of each month.

Appellant admitted on cross-examination that he had never called a partnership meeting after the

meeting of October 20, 1940 (R-3 p. 753, lines 11-22), and that he had never issued a financial statement as ordered at the meeting (R-3 p. 753, line 23 to p. 754, line 1). He remembered the decision that no further loans were to be made to partners (R-3 p. 754, lines 2-7), yet he explained his increase in net worth by claiming that he had "borrowed" a total of \$36,058.80 from the partnership by the end of 1946 (Deft's. Ex. BB; R-3 p. 613, lines 7-11).

No drawing accounts were set up on the books of the business for any of the alleged partners, including appellant (R-3 p. 875, lines 8-20), and appellant did not even keep a record of the amount he claims he borrowed from the partnership (R-3 p. 613, lines 12-13).

To summarize, the evidence shows that during the years 1943, 1944, 1945, and 1946 appellant conducted the business of the Palace Market as the sole owner. He ran the business, signed the checks, distributed no profits to anyone else, acknowledged no duty to distribute profits, and disregarded the requirements of both the original partnership agreement and the meeting held in 1940.

Fully cognizant of his exclusive ownership, appellant prepared and filed partnership income returns for the business and reported only a portion of the net income on his individual returns. The remainder of the income was reported by no one. It is significant that, whereas appellant obtained the assistance of an attorney in the preparation of his individual

returns, he prepared the partnership returns himself and did not even discuss them with the attorney. (R-2 p. 46, lines 4-7.) That his purpose was to evade his taxes through the use of the partnership device is evident.

C

Appellant's income was properly computed on the basis of his increase in net worth.

Appellant also argues that the net worth method of computing income, used by the Government to establish a tax deficiency was improper in that (a) there was not a sufficient showing that the defendant's books were "inadequate" to justify disregarding them, and (b) the balance sheets prepared by the Government were based entirely upon the uncorroborated extrajudicial admissions of the defendant.

As testified by Special Agent Englund (R-2 p. 168) the Government ordinarily uses the net worth method in the computation of income only when the taxpayer's books and records are inadequate. Appellant argues that the prosecution failed to show that his books and records were inadequate. However, he cites no case holding that the use of the net worth method is conditioned upon a showing of the inadequacy of existing books and records, for *there is no reported decision which so holds*. Nor have the courts undertaken to define the term "inadequate" in this connection. However, in the case of *Jelaza v. United States*, 179 F. (2d) 202 (C.C.A. 4th), the use of the net worth method was approved notwith-

standing evidence that the books of the taxpayer were, on their face, apparently as well kept as the average books kept by others in a similar business.

In the *Jelaza* case the defendant was tried and convicted of attempted evasion of income taxes for the years 1943 and 1944. At the trial the Government introduced evidence of his net income for those years based on three alternative methods of computation: the expenditures method, bank deposits plus cash expenditures, and the net worth method. The judgment was affirmed by the Court of Appeals, notwithstanding the fact that the defendant's books and records were apparently regular on their face and an employee of the defendant testified at the trial that, to the best of his knowledge, the sale price of all goods sold by the taxpayer was clearly marked and that all sales were run through the cash register.

The appellant's books and records were kept on the basis of a single-entry system. (R-2 p. 170, lines 1, 2; R-3 p. 979, lines 6, 7.) George Harbinson, a certified public accountant called by the defense as an expert witness, testified that this system has a basic weakness in that there are not two "self-balancing sets of accounts" as in a double-entry system, with the result that errors cannot be readily checked. (R-3 p. 979, lines 18-21.) The use of such a system is in itself an inadequacy which might well justify the use by the Government of the net worth method. See *Index Notion Co.*, 3 B.T.A. 90, 92, where the Court said:

Where books of account are maintained by the single-entry method of bookkeeping, the determination of net income is made by comparison of the net worth at the close of the year with the net worth at the beginning of the year.

However, there were other and more significant inadequacies in the particular method of bookkeeping used by the appellant. Mr. Harbinson testified, as an expert for the defense, that the method had two definite weaknesses; that the first of these consisted of the method of handling charge sales, which were not rung up on the cash register (R-3 p. 979, line 25 to p. 981, line 13); and that the second consisted of the method of keeping the books with respect to the handling of cash (R-3 p. 981, line 16 to p. 982, line 9). It should also be noted that the cash registers used by the appellant did not have tapes (R-3 p. 678, lines 7-9); the appellant admitted on the stand that he took cash from the till for his personal living expenses (R-3 p. 655, lines 5-8); and sales tags for charge sales (which were not rung up on the cash register) were destroyed after payment was made (R-3 p. 681, lines 13-18), so that no basic record remained as to charge transactions.

As explained in appellant's brief (pp. 43-48) the appellant's records were kept partly in English and partly in Chinese. Considerable emphasis is placed by the appellant on the failure of the Government to obtain a complete translation of the Chinese records before resorting to computations based on increase in net worth. However, the evidence shows that ap-

pellant had prepared English summaries of his Chinese records for the years 1944, 1945, and 1946 (referred to as the "butcher paper summaries") which he had furnished to Special Agent Englund and which Mr. Englund had found to agree with the partnership returns filed by the taxpayer for those years. (R-2 p. 167, lines 8-11; R-2 p. 189, line 13 to p. 190, line 6.) The defendant testified that he had in fact prepared the partnership returns for the years 1944, 1945, and 1946 from these summaries. (R-2 p. 464, lines 3-14; R-2 p. 467, lines 12-17; R-2 p. 469, line 23 to p. 470, line 15.) The summaries were introduced in evidence as Defendant's Exhibits T, U and V.

Finding that these summaries, which were prepared by the taxpayer himself, were in agreement with the partnership returns for the years 1944, 1945, and 1946, the special agent was entirely justified in concluding that the Chinese records themselves agreed with the returns, and in inferring that the same would be true for the year 1943, as to which the taxpayer had made no summary. Significantly, however, neither the partnership returns nor the individual returns filed by appellant reported sufficient income to account for the material wealth accumulated by him during these years, and this demonstrates another sense in which the taxpayer's books and records may be considered inadequate.

There is no contention that appellant's increase in net worth reflected any gifts, bequests, inheritances, or other non-income items with the exception of the

repayment of certain loans in the total amount of \$3,600 in 1946. (Deft's. Ex. BB.) With the exception of a small amount of rental income in 1945 and 1946, all of the taxpayer's income was derived from the Palace Market and his increase in net worth is a reflection of such income. Yet it is impossible to account for the net worth increase on the basis of his books and records. It is obvious that the books and records do not adequately record appellant's income.

Finally, it should be noted that although the James Soo Hoo, accountant, and George Harbinson, certified public accountant, who testified as expert witnesses for the defense, had been employed to make an audit of his books and records in preparation for the trial (R-3 p. 756, line 20 to p. 757, line 6; R-3 p. 974, line 4 to p. 976, line 5), *the results of this audit were never presented to the jury by the defendant. The accounting evidence presented by the defense, like that presented by the Government, was based on the use of the net worth method of computing income.* See Defendant's Exhibits AA, BB, and CC. Thus, while the appellant complains about the use of the net worth method by the Government, he used precisely the same method in presenting his case.

The differences between appellant's computations and those of the prosecution are not significant when the partnership question is eliminated. This was demonstrated by the Government during the cross-examination of James Soo Hoo, an accountant who testified as an expert witness for the defense. While

he was on the stand Mr. Soo Hoo was asked to construct revised balance sheets showing the net worth of the taxpayer as of December 31, 1942, and December 31, 1946, the beginning and end of the total period under consideration. He was instructed to use, generally, the values assigned by the defense in its balance sheets (Deft's. Exs. AA, BB, and CC) to the various assets and liabilities, but to assume that there was no partnership in existence during the period. (R-3 p. 942, line 14 to p. 943, line 4.) The amounts shown on the balance sheets introduced in evidence by the defense were used, except as certain changes were indicated by the evidence presented at the trial.

The balance sheets which Mr. Soo Hoo thus constructed on the witness stand (Pltf's. Ex. 45) showed that at the beginning of the year 1943 the taxpayer had a negative net worth of \$17,599.29 (that is, his liabilities exceeded his assets by that amount) and at the end of 1946 he had a positive net worth of \$68,675.97, indicating an increase in net worth over the four-year period of \$86,275.26. The Government's figures set forth in Plaintiff's Exhibit 39, by way of comparison, showed an increase in net worth over the same period amounting to \$83,875.89.

Appellant attacks the values assigned by the prosecution to certain items of the taxpayer's net worth and claims that certain other items were erroneously omitted. (Br. p. 10.) Without discussing these items in detail, it is apparent that the figures used by the prosecution were, in toto, more favorable to the tax-

payer than those presented by the defense, as demonstrated by the defendant's own expert, Mr. Soo Hoo.

Whether or not a particular Government translator was able to translate the taxpayer's Chinese books and records is of no great moment in the Government's theory of this case. These books and records were undoubtedly susceptible of translation, if not by Victor Chin, then by someone else. As shown above, they were inadequate in many respects without regard to the language in which they were written, and the use of the net worth method of computing income in this case need not be justified on the basis of the Government's inability to translate the records.

It is true that there is but one Chinese written language, and it appears likely that Special Agent Englund misunderstood the statement of Victor Chin on that point. However, it is also true that the various spoken dialects of the Chinese language are reflected in terminologies and usages peculiar to particular regions, with the result that a translator from one part of China may not be able to understand the meaning of all that is written by a person from another region. It is entirely possible that certain designations used by the taxpayer in his books and records were unintelligible to Victor Chin.

Incidentally, appellant is in error in his repeated statements that Victor Chin was present in the court room throughout the trial. (Br. pp. 52, 114.) Victor Chin was not in the court room at any time during the trial. David Ip, a deputy collector of Chinese

extraction who had had no previous connection with the case, was brought up to Sacramento from the Collector's office in San Francisco after the first day of trial and he thereafter assisted the Government as a translator.

Appellant claims that the balance sheets prepared by the prosecution and introduced into evidence as Plaintiffs' Exhibit 39 relied entirely upon extrajudicial admissions of the accused. The record clearly shows that this is not so. The balances in each of the taxpayer's three bank accounts at the beginning and end of each year were established by the bank ledger sheets which were introduced in evidence as Plaintiff's Exhibits 26, 27, and 28, as well as by a stipulation entered into by counsel. (Pltf's. Ex. 17.) A business account receivable from Su Quock in the amount of \$500 was evidenced by a photostatic copy of the check by which the loan was made. (Pltf's. Exhibit 25.) Counsel stipulated (Pltf's. Ex. 11) that the taxpayer's purchase of a dwelling at 4255 Herbert Street, Sacramento, was recorded in the office of the registrar of deeds for Sacramento County, California, and that the purchase was evidenced by two cancelled checks issued by the taxpayer to Artz & Cook, Inc., as follows:—Check drawn on the account of Jack Chan with the Merchants National Bank, dated November 10, 1943, in the amount of \$200, and check drawn on the Palace Market account with the Capital National Bank, dated November 17, 1943, in the amount of \$6,567.42.

The cost of home furnishings purchased by the taxpayer during the years under consideration was established by two cancelled checks in the respective amounts of \$205 and \$275.83, which were introduced in evidence as Plaintiff's Exhibit 29. Counsel stipulated (Pltf's. Ex. 15) to the cost of certain real property located at 816 "J" Street, Sacramento, and the cost was partially corroborated by three cancelled checks totaling \$15,000 (Pltf's. Ex. 14). The cost of the lot on Herbert Street was stipulated to by counsel (Pltf's. Ex. 16.) Counsel stipulated that the taxpayer paid \$1,100 for a Packard automobile in 1943 (Pltf's. Ex. 19), and the cancelled check issued in payment thereof was introduced in evidence (*Ibid.*). The cost of motion picture equipment acquired in 1946 was likewise supported by both a stipulation and a cancelled check which was introduced in evidence. (Pltf's. Ex. 20.)

Evidence of the taxpayer's liabilities was likewise presented at the trial. The taxpayer's cancelled checks issued in repayment of his accounts payable to Hip Hing Co., J. B. Johnson, Chin Wing, and Quok Bros. were introduced in evidence. (Pltf's. Exs. 30, 31, 32, and 33.) A group of checks by which liabilities to former partners were discharged were introduced in evidence as Plaintiff's Exhibit 34.

Expenditures made by the taxpayer for insurance premiums, income taxes, purchase of foreign exchange, and medical expenses were likewise evidenced by cancelled checks which were introduced in evi-

dence. (Pltf's. Exs. 35, 36, 37, and 38.) An interest payment made in 1944 was accepted as shown on the taxpayer's income tax return, which was in evidence as Plaintiff's Exhibit 2.

In view of this volume of documentary evidence it can hardly be maintained that there was no corroboration for the defendant's extrajudicial admissions as to the items of assets and liabilities comprising his net worth.

III.

THE ACTION OF THE TRIAL COURT IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL IS SUBJECT TO REVIEW IN THIS COURT ONLY FOR CLEAR ABUSE OF DISCRETION, AND NO SUCH ABUSE OF DISCRETION IS SHOWN.

Rule 33 of the Rules of Criminal Procedure for the District Courts of the United States provides, in part, "The court may grant a new trial to a defendant if required in the interest of justice." It is well established, however, that the action of the district court in granting or refusing to grant a new trial is a matter of discretion and cannot be reviewed in this Court except for clear abuse of discretion. *Brolaski v. United States*, 279 Fed. 1 (C.C.A. 9th), certiorari denied, 258 U.S. 625, 42 S.Ct. 381; *United States v. Holt*, 108 F. (2d) 365 (C.C.A. 7th), certiorari denied, 309 U.S. 672, 60 S.Ct. 616, rehearing denied, 309 U.S. 698, 60 S.Ct. 806. It is clear that the trial

Court did not abuse its discretion in this case in denying appellant's motion for a new trial, and there is no basis for review of its action by this Court.

IV.

THE TRIAL COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF THE INVESTIGATING AGENTS AS TO ADMISSIONS OF APPELLANT THAT NO PARTNERSHIP EXISTED DURING THE PERIOD 1943-1946.

Appellant claims that the investigating agents were improperly permitted to give to oral summarizations or characterizations of admissions made by appellant as to the existence of a partnership rather than giving the actual statements that were made or even the gist or substance of these statements. (Br. p. 84 *et seq.*) It is submitted that the agents were testifying to the substance of statements made by appellant to the best of their recollection and that it was not error to admit such testimony in evidence. Their testimony is corroborated by the taxpayer's recorded statements under oath (Pltf's. Ex. 40) which have been previously discussed.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment and sentence of the Court should be affirmed.

Dated, San Francisco, California,
November 6, 1950.

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No. 12,596

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CHAN SHING HO, also known as Jack
Chan,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the District Court of the United States
for the Northern District of California.**

APPELLANT'S REPLY BRIEF.

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FILED

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**On Appeal from the District Court of the United States
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APPELLANT'S REPLY BRIEF.

INTRODUCTION.

In his opening statement to the jury, counsel for the Government stated as follows:

That the Government would prove that in 1941 at a meeting of the business partnership which had theretofore owned and operated the Palace Market at 816 J Street, Sacramento, the partnership had dissolved; that the defendant Jack Chan had thereupon become the sole owner of the business; that thereafter he had owned and operated the business as an individual and that after the dissolution Jack Chan had set up a fictitious continuation of the partnership to evade in-

come taxes. No claim was then made, or during the prosecution's case that there was any other tax evasion perpetrated or attempted.

As a part of the prosecution's case an elaborate mimeographed statement (Pltf's Exhibit 39) was prepared and handed to the jury and thereafter carried by them throughout the trial lasting over a period of fifteen days. This was a "balance sheet" based entirely upon what special agent Englund said that Defendant Jack Chan had said were the assets and liabilities of the business of the Palace Market—and *treating the Palace Market as solely owned by defendant*—at the beginning of the period and thereafter through 1946. According to this balance sheet it was claimed that appellant's net worth increased from minus \$762.78 to \$83,113.11 during the four year period.

The government in its brief says:

*"The evidence clearly established, however, that no partnership was in existence during these years."**

(Appellee's Br. p. 4.)

Willfulness and fraud by which the taxpayer used a defunct partnership as a basis for evading his income tax obligation was thus the theory AND THE ONLY theory seriously urged.

Therefore, if the record shows that such dissolution was NOT proved, then the whole structure of the Government's case—the sole and only proof of willful intent—falls like a house of cards.

*Emphasis ours throughout unless otherwise noted.

WE SUBMIT THAT THE EVIDENCE CLEARLY ESTABLISHES THAT NO TERMINATION OF THE PARTNERSHIP OCCURRED UNTIL AFTER 1946 ALTHOUGH CERTAIN PARTNERS AS THE RETURNS SHOW WERE BOUGHT OUT IN 1945, 1946.

It is conceded that there WAS a partnership and that it existed from 1923 at least until 1941; that there were some twenty-five partners, whose several interests are undisputed; that various of these partners worked for the business; that from the inception of the partnership, Mr. Chan ran the business as the sole manager, signed all the checks, paid all the bills (when he could) and made all the decisions.

If, then, there was a termination of the partnership some words or acts must have terminated it. Some agreement, oral or written must have been entered into and must have become executed. How else is the termination of a partnership effected?

Throughout this case, and in the arguments, we have been using the word "dissolution." This is loose use of language, "termination" is the proper word. California (in common with most of the states) has adopted the uniform partnership act. This act is now embodied in our Corporations Code. Sections 15029-15043 (Article VI) cover the dissolution and winding up of partnerships.

Section 15030 provides:

"On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed."

No purpose will be served by a technical dissertation upon the question of partnership dissolutions or the distinctions between the dissolution and the

termination, or winding up, of the affairs of the partnership. The question here is simply this: Did the partnership end before 1943? Was there a formal agreement between all the partners, written or oral; did the defendant Chan buy his partners out, and become the sole owner of the business?

If the partnership did end—if defendant Jack Chan did become the owner of the business what FACTS—what words or acts of the partners accomplished this?

We have shown how defendant Jack Chan, always sole managing partner before and after, went to China in 1940 to bring home a wife, how two meetings of the partners were held in 1940, one during his absence in which the financial condition of the partnership was discussed, the other when Mr. Chan returned and in which he was reappointed managing partner and beseeched to parry and pacify the partnership's creditors. (Appellant's Br. pp. 16-18.)

The FACTS in evidence show the subsequent events to have been as follows:

(1) That between 1940-1945 defendant Chan continued to run the business *precisely as before*. Some of the working partners, employees of the store, quit their employment in and around 1940 but when they left *not a word was said about terminating the partnership*.

(2) The minute book is in evidence. It shows no meetings held or mention of dissolution.

(3) During 1945-1946 Mr. Chan commenced to buy out his partners at their request. The first part-

ner who took any affirmative action to withdraw was George Chan. In 1945 he entered into a written agreement with Jack Chan prepared by George Chan's lawyer, selling his interest in the business to appellant.

(4) The Foo Chong interest was bought out in 1946. It was evidenced by written agreement.

(5) Harry Young (Young Poi Gay) was bought out in January 1947. Later the others were bought out. The purchases by Chan were not at his solicitation. The offers were made by the several partners, accepted by the defendant. (Appellant's Br. pp. 19-30.)

These are the FACTS. They are uncontroverted and uncontrovertible facts. Appellee, in his brief, claims as follows:

First, that "the defendant *clearly* admitted to the investigating agents that he had enjoyed exclusive ownership of the business, at least from 1943 on. (Appellee's Br. p. 9.)

Second, that "the testimony of the other alleged partners who testified at the trial likewise supports the conclusion that no partnership existed during the period in question." (Appellee's Br. pp. 9, 10.)

Third, "strong circumstantial evidence points to the same conclusion." (Appellee's Br. p. 11.)

We will discuss these claims seriatim. If they can be sustained, they can only be sustained by evidence, legal, relevant and admissible, sufficient to prove guilt to a moral certainty and beyond a reasonable doubt.

A mere scintilla of evidence is insufficient to support a verdict.
 The prosecution does not sustain its burden unless the evidence is sufficient to justify men and women of ordinary reason and fairness to find the defendant guilty to a moral certainty and beyond a reasonable doubt.

The rule that this Court must consider the evidence in the light most favorable to the prosecution does not mean that merely *any evidence at all*, or *inference without evidence* is sufficient to sustain a verdict.

So to hold would render empty and meaningless the equally well-settled rule that in a criminal case the defendant's guilt must be established "to a moral certainty and beyond a reasonable doubt." The evidence which is sufficient, and that which is insufficient, to produce such a state of mind has been at least, with generalization, defined.

Says Mr. Wigmore:

"The question is thus presented, in determining this sufficiency of evidence to go to the jury, whether there are any detailed *tests to control or guide the judge** in his ruling.

"The ruling will, in truth, depend entirely on the nature of the evidence offered in the case at hand * * * There is no virtue in any form of words." (9 Wigmore on Evidence, 3rd Ed. Sec. 2494 p. 296.)

"A mere scintilla of evidence is insufficient to sustain a verdict" (9 Wigmore on Evidence, 3rd Ed. Sec. 2494, p. 296, note 11 citing among other authorities: *Commrs. v. Clark*, 94 U.S. 278; 284; 24 L. Ed. 59, 1897; *Gunning v. Cooley*, 281 U.S. 90; 74 L. Ed. 720.)

*Emphasis is the author's.

“Perhaps the best statement of the test is this: ‘The proposition cannot merely be, Is there evidence? The proposition seems to me to be this: *Are there facts in evidence which, if unanswered, would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain?* (citing cases.)” (9 Wigmore on Evidence, 3rd Ed., p. 299, Sec. 2494, “Sufficiency of Evidence”).

Adopting these statements we will now examine appellee’s evidence claimed to prove the termination of the partnership to see if it meets the test.

Mr. Chan’s so-called admissions were not admissions at all. Construed in their context the full statement is an assertion of an existing partnership in 1943-1946. Even stripped from its context it is an expression of opinion.

Appellee states:

“Special Agent Englund testified that the defendant had told him that the partnership was discontinued in 1941 * * * and that he said business all mine since 1941.” (Appellee’s Br. p. 9.)

As noted in our opening brief, times, places, parties present, the gist of the conversation, as distinguished from the witness’ characterizations were not related. Received over objection, these were merely vague summarizations. Although the witness had kept a diary, he produced no record of the conversations.

In our opening brief we cited and quoted from *O’Neill v. United States*, C.C.A. 8th Ct., Apr. 22, 1947, 19 F. (2d) 322, wherein the rule is said to be well settled “that a witness who has heard a statement or conversation should not be permitted to state his conclusions as to what was stated or admitted”.

Reasons for the rule are obvious. How can one pin down or cross-examine a vague characterization particularly when made by an obviously zealous prosecuting witness? How can one ascertain the context of, and circumstances surrounding, the statement? *When we do get to a statement where ALL of the statement is before us, we find that the appellant's so-called admissions are not admissions at all.*

That is why the "sworn statement" of defendant Chan dated January 19, 1948 (Pltf's Exhibit 40) is so significant. Plaintiff's only use of this statement is to strip from the context a single phrase

"* * * 1940 I went back to China and then '41 all partners everybody dropped out of business. Nobody wanted to stay in business. Too many bills, and then I take them all."

And having stripped the phrase from the context appellee claims that this is an admission by the defendant that there had been a legal termination of the partnership in 1941. Before we answer this, *may we put the phrase back into its context?* In Appendix A to this brief (infra p. i) we have set forth ALL the questions and answers which relate to the termination of the partnership and in the order of their statement.

Contained within its context and read as a whole, the statement of Mr. Chan is a statement over and over again that there was a partnership in 1945 with twenty-five partners, reduced in 1946; then when the partners reached an agreement with Mr. Chan and

retired from the partnership they then received their original investment back.

There were various partners who were employed by the business—"working partners". When Mr. Chan returned from China business was bad and the working partners quit their employment. Later in 1945 Mr. Chan, as his partnership returns show, started to buy them out and in 1946 continued the purchase. "Now the business mostly mine, mostly mine."

Thus stated, the statement is completely in accord with all of the FACTS in the record.

Stripped of the context "'41 all partners everybody dropped out of business" is an ambiguous statement. It could mean (as it obviously does mean read IN its context): "'41 all partners quit working for the business". Construed as meaning, "In '41 all partners withdrew from the partnership which was thereby terminated" it is an expression of opinion.

An opinion by a lay witness is valueless as evidence and therefore inadmissible.

We will discuss the Opinion rule hereinafter in connection with the testimony of the other witnesses.

Appellee seeks to find corroboration in statements by other witnesses.

No fact was testified to by any witness justifying an inference that the partnership had terminated. No such statement of fact (distinguished from opinion) was ever made to a government agent.

On page 10 of appellee's brief three witnesses are referred to who are claimed to corroborate the termi-

nation of the partnership, Henry Chan, George Chan, and Harry Young. As to Henry Chan, appellee claims "Henry Chan * * * testified that he talked with the taxpayer about the middle of 1939 about withdrawing from the partnership and that it was thereafter *his understanding* that he had withdrawn as a partner." (Appellee's Br. p. 10.)

Appellee concedes that the testimony of George Chan as to *facts* was that in 1945 he assigned his interest in the partnership to Jack Chan. To impeach this testimony appellee calls attention to another question and answer statement made during the investigation in which he is stated to have stated "that the partnership terminated in 1941 and that he was a partner from 1927 to 1941 only."

The third witness, Harry Young, is said by appellee to have said that he "definitely thought he was out of the partnership in 1941."

This is not a fair summary of the testimony of any of these witnesses. We have set forth in Appendix B attached hereto (infra p. iv) the testimony of the three witnesses, Henry Chan, George Chan and Harry Young.

It appears from this testimony that when the witnesses are testifying to the data from which inferences are to be drawn—i. e. when they are testifying to facts, it is clear that there was no word, act or deed which could possibly lead to an opinion or conclusion that the partnership had terminated.

Opinions by lay witnesses (with exceptions not important here) are inadmissible at any time. But where the data on the basis of which an opinion is expressed is in evidence and shows that the opinion is the expression of a legal conclusion not justified by the fact it is doubly inadmissible.

“It is no satisfaction for a witness to say that he ‘thinketh’ or ‘persuadeth himself’ and this for two reasons, first, because the judge is to give an absolute sentence * * * secondly, the witness cannot be sued for perjury” (Lord Coke in *Adams v. Canon* (1622) *Dyer* 53b, reported in 7 *Wigmore*, 3d Ed. p. 2 Sec. 1917.

“The judge might say: ‘We want not your opinion; have you any facts? For we can guess and opine as well as you can; tell us facts, if you have them.’ ” (7 *Wigmore* 3d Ed. p. 2 Sec. 1917.)

An opinion by a lay witness is valueless as evidence and therefore inadmissible when the jury can be put into a position of equal vantage for forming an opinion by the relation of the facts by the witness from which the opinion is to be drawn. (7 *Wigmore* 3d Ed. p. 2, Sec. 1917.)

“There is no more familiar principle in the law of evidence than that the opinions of witnesses are in general irrelevant. * * * Even when witnesses are limited in their statements to facts within their own knowledge, their bias, ignorance and disregard of the truth are obstacles which too often hinder in the investigation of the truth. If it were a general rule of procedure that witnesses might be allowed to state not only those matters of fact about which they are supposed to have knowledge but also the opinions they might entertain about the facts in issue, the administra-

tion of justice would become little less than a farce."

(*Jones on Evidence*, 3rd Ed., Sec. 359.)

There are, of course, exceptions to this rule. None of the exceptions apply to the instant case. As a matter of fact, the instant case is an excellent one to illustrate the rule. The FACTS show clearly there was no word, act or deed of any actor in this case which did or could constitute a termination of the partnership. Therefore the opinions expressed (usually not in court but in extrajudicial statements "I thought", "I considered", "'41 all partners quit business" can have no probative value, no relevancy whatever.

Where a witness testifies, "It was my understanding I had withdrawn from the partnership in 1941", "I call it terminated in 1941", or "I thought I was out, that is all", and where the data is all in evidence and it shows that nothing was stated in any conversations related from which an inference of retirement from, or termination of, the partnership could be justified, and where presence at meeting, letters and written agreements show that the persons expressing the opinions *were* partners until 1945-1946, the expression of the opinion becomes worthless as evidence.

This is recognized by the Model Code of Evidence.
"RULE 401 TESTIMONY IN TERMS OF OPINION.

(1) In testifying to what he has perceived a witness, whether or not an expert, may give his testimony in terms which include inferences and may state

all relevant inferences, whether or not embracing ultimate issues to be decided by the trier of fact, unless the judge finds * * *

(b) that the witness can readily and with equal accuracy and adequacy communicate what he has perceived to the trier of fact without testifying in terms of inference or stating inferences, and his use of inferences in testifying will be likely to mislead the trier of fact to the prejudice of the objecting party.

(2) The judge may require that a witness, before testifying in terms of inference, be first examined concerning the date upon which the inference is founded.” (American Law Institute Model Code of Evidence p. 199.)

The so-called circumstantial evidence of termination of the partnership was not evidence of that fact at all. Appellant’s conduct in the operation of the business was precisely the same before as after the claimed date of termination.

Appellee states that “strong circumstantial evidence points” to the conclusion that the partnership had terminated prior to 1943. (Appellee’s Br. p. 11.)

This “strong circumstantial evidence” is summarized by appellee as follows:

“To summarize the evidence shows that during the years 1943, 1944, 1945 and 1946 appellant conducted the business of the Palace Market as the sole owner. He ran the business, signed the checks, distributed no profits to anyone else, acknowledged no duty to distribute profits and disregarded the requirements of both the original partnership agreement and the meeting held in 1940.” (Appellee’s Br. p. 13.)

The trouble with this argument is that the appellant's conduct has been exactly the same since the inception of the partnership, and during all of the period when admittedly the partnership was in existence. This has been abundantly shown in the review of the testimony contained in our opening brief. (Appellant's Br. pp. 15-19.)

Since the conduct before the claimed termination and the conduct afterwards is exactly the same, such conduct has no probative value whatever to establish the inference claimed for it by appellee.

Circumstantial evidence like testimonial evidence is relevant only where "the claimed conclusion from the offered fact must be a possible, or a probable or a more probable hypothesis, with reference to the possibility of other hypotheses. This is not only the general principle that best described the attitude of the courts but also the expressed form of the test for specific kinds of facts." (1 Wigmore on Evidence, 3d Ed., p. 428, Sec. 38.)

A quotation from the same author's text is as follows:

(Quoting from Brickley C. J. in *Levison v. State*, 54 Ala. 528) " 'The rule is clear and well defined that facts and circumstances which when proved are incapable of affording any reasonable presumption or inference in regard to the material fact or inquiry are not admissible in evidence.' "

Section 1868 of the California Code of Civil Procedure states the rule as follows:

"Evidence must be * * * relevant to the question in dispute."

This so-called circumstantial evidence has no probative value not only because the acts and conduct of the appellant were the same during the admitted existence of the partnership and before the claimed termination, but also because they are acts and conduct which are quite compatible with the existence of a partnership.

Sole management in one partner is a common and usual thing; disregard of articles of incorporation, by-laws and other written agreements regarding the holding of meetings, the making of financial statements, are—as every lawyer knows—more honored by disregard than by observance. The writer has never seen articles of incorporation or corporate by-laws, for example, which did not call for regular directors' meetings, annual shareholders' meetings. In small corporations these are seldom if ever held.

Appellant's failure to disclose or pay profits to the partners does not prove a termination of the partnership. It may prove a violation of a fiduciary duty by one partner owed to his other partners. It may even indicate an unauthorized appropriation of partnership funds, but it doesn't prove the non-existence of a partnership.

IT AVAILS APPELLEE NOTHING TO ATTEMPT TO SHIFT ITS THEORY OF THE CASE TO JUSTIFY A CONVICTION WITH THE PARTNERSHIP EXISTING IN 1943-1946. WITHOUT PROOF OF TERMINATION OF THE PARTNERSHIP THERE IS NO PROOF OF WILLFULNESS.

As was abundantly demonstrated in appellant's opening brief (pp. 5-7) the Government's whole case

was predicated upon a termination of the partnership.

Appellee now asserts "The evidence is sufficient to support the verdict even assuming the existence of a valid partnership as claimed by appellant." (Appellee's Br. p. 6.)

Appellee points to a \$3,693.97 understatement of income by the appellant over the four year period as proof of "the existence of substantial tax deficiency" and states that this is also sufficient to establish "an inference of affirmative attempt to evade taxes without further evidence of willfulness". (Appellee's Br. p. 7.)

Appellee cites cases where "*false* returns" and "*intentional* omission of income" have been held to constitute willful tax evasion.

But appellee carefully omits to mention or even suggest wherein, in this case—assuming the existence of the partnership—any of the returns filed were false or where there was any intentional omission of income.

Appellant, on the contrary, has demonstrated beyond peradventure of doubt that there was *no* intentional omission of income; no false returns. Not one item of evidence in this regard was offered by the prosecution in this case. And when it came the appellant's turn to put on his case, he painstakingly brought forth his books, showed them to be full in every respect—and as accurate as most small businesses; showed how he had erred (as hundreds of

thousands of taxpayers have erred) in charging partners' wages and board as expense, in charging capital expenditures as repairs, and similar common accounting mistakes—mistakes which added up to an income tax deficiency, so far as the defendant's individual liability was and is concerned, of an average of \$900 of unreported income (not tax) per year during the four years.

To argue that this constituted willful income tax evasion when on the very face of the returns and throughout the taxpayer's records the errors shriek and proclaim themselves is to argue an absurdity.

To argue that a conviction can be sustained on the grounds that the jury may have believed that the defendant was guilty of tax evasion in such minor errors when throughout 15 days the prosecution was busy persuading its members that the defendant had set up a phony partnership to hide his taxes, is to argue an outrageous thing. Such an argument postulates that if the prosecution in a tax evasion case can with a false theory persuade a jury to return a verdict of guilty, the conviction can be sustained if ANY omission of income can be found in the taxpayer's returns.

There is some suggestion in the brief of appellee that Mr. Chan accumulated great wealth during the period 1943-1946 on which he paid no income tax. This is not borne out by the record. The computations of the public accountants (Defendant's Exhibit CC) not challenged by appellee—if the partnership existed during the period—show that the total

unreported income received by appellee during the four years is \$3,693.97. Appellee concedes:

“The differences between appellant’s computations and those of the prosecution are not significant when the partnership question is eliminated.” (Appellee’s Br. p. 18.)

Mr. Chan does not have great wealth and did not have, or acquire, wealth during the period in question. He took money owed him by the partnership for back wages, borrowed more from the partnership and made a down payment on a piece of real property. Working hard, he and his whole family, Mr. Chan during the years 1943-1946 increased his net worth by \$25,145.58 (Defendant’s Exhibits BB and CC) of which he reported and paid income tax on \$21,451.61.

A PROSECUTION BASED, AND CONVICTION REACHED, SOLELY UPON AN EXTRAJUDICIAL ADMISSION OF THE DEFENDANT CANNOT BE SUSTAINED.

However skillfully appellee may try to argue otherwise, it has now become clear that it must rely exclusively upon the claim that a statement by the defendant: “ ’41 all partners, everybody dropped out of business * * * ” as the sole evidence to establish the all-important, indispensable, claim of partnership termination.

Granting to the statement (solely for the purpose of argument) all the force and credence contended for it by the prosecution, they cannot deny, and they do not deny, that it is an extrajudicial admission.

The opening brief (pp. 95-111) argues the proposition that a conviction based wholly upon extra-judicial admissions, cannot be sustained. The authorities stated therein so holding are full and conclusive. We cited and quoted from: *Forte v. U. S.* (CCA Dist. Col., Apr. 5, 1937), 94 F. (2d) 236; *Pines v. U. S.* (CCA 8th Ct., Dec. 5, 1941), 123 F. (2d) 825; *Gulotta v. U. S.* (CCA 8th Ct., July 24, 1940), 113 F. (2d) 683; *Gordiner v. U. S.* (CCA 9th Ct., Jan. 7, 1920), 261 F. 910; *Martin v. U. S.* (CCA 8th Ct., Apr. 9, 1920) 264 F. 950; *Nicola v. U. S.* (CCA 3rd Ct., Aug. 9, 1934), 72 F. (2d) 780.

In appellee's brief this argument and these authorities are not even mentioned. It must be concluded therefore that appellee fully agrees with what we said there and with these authorities.

If, therefore, as we contend, on the all-important issue of the termination of the partnership, on proof of which the whole case of the prosecution hinges, there is no evidence to show termination other than the defendant's admission, the conviction must be reversed.

NOT ONLY WAS THE PROSECUTION'S PROOF OF PARTNERSHIP TERMINATION BASED SOLELY UPON AN EXTRA-JUDICIAL ADMISSION; SO ALSO WAS ITS PROOF OF UNREPORTED INCOME TAX.

If the case of the prosecution failed with respect to the issue of the termination of the partnership then the conviction must be set aside and further argument becomes unnecessary.

For the sake of completeness of argument, however, it has been pointed out in the opening brief and should be repeated here that the whole case of the prosecution—in its claim of unreported income as well as in its claim of a terminated partnership—was constructed on a framework of extrajudicial admissions and *nothing but extrajudicial admissions* and therefore since the entire proof of unreported income as well as of willfulness rests upon admissions and the *corpus delicti* is not otherwise established, the conviction must be set aside on that ground.

Appellee states: “he (appellant) cites no case holding that the use of the ‘net worth’ method is conditioned upon a showing of the inadequacy of existing books and records, for there is no reported case which so holds”. (Appellee’s Br. p. 14.)

We respectfully suggest that appellee misses the point. We have cited, among other cases, *U.S. v. Chapman* (CCA 7th Ct., June 18, 1948; 168 F. (2d) 997; Appellant’s Op. Br. p. 117), which holds that “in a net worth case *the starting point must be based upon a solid foundation and a revenue agent’s statement of the defendant’s oral admission or confession when uncorroborated is not enough to convict*”.

In the *Chapman* case the starting point *was* based upon a firm foundation—the defendant’s books and records were the basis of the net worth statement. In that case the figures contained in the defendant’s extrajudicial statement were corroborated by the books and records.

We say that appellee misses the point because the vice in its argument is not in the use of a net worth statement. It lies in the use of extrajudicial statements exclusively when accurate proof was at hand. Net worth statements, or balance sheets, which are based upon true books and records, produces a result as accurate as a profit and loss statement (i.e., an income statement) taken from the same books.

While it will be profitless to engage here in academic technical argument on the issue of "net worth" statements versus profit and loss statements to show income, it may be stated in passing that use of any net worth statement may be open to the same criticism as the statement by a witness of an opinion or conclusion when the basic data upon which the opinion is based is equally available and at hand. The profit and loss statement, or income statement, is the statement of the income itself, whereas computations of income based upon periodical balance sheets, is a drawing of inference upon inference the accuracy of which depend upon the accuracy of the basic data.

Since the basic data—all books, records, cancelled checks, bank statements, check stubs, etc.—necessary to show all the defendant's income were available here it was unnecessary for the government to use a "net worth expenditures" method at all.

But the principal complaint is not use of the "net worth" method—it lies in the fact that the government agents, under the pretext that the books and records were inadequate (principally because their Chinese interpreter could not speak the Chinese dia-

lect in which they were written!), were satisfied to disregard all such books and records and to base their case solely upon the claimed extrajudicial statements of the accused.

We say that the government's case is based "solely" upon extrajudicial statements advisedly. The foundation of the "net worth expenditure" method is the beginning net worth. As stated in the *Chapman* case, if the "foundation" is firm the increase in net worth will show income; without this firm foundation the method is valueless for that purpose.

That which the government claims to have been the beginning net worth of the defendant, his net worth on January 1, 1943, is based entirely upon what the defendant told the agents. The evidence which would have actually established that beginning net worth was completely disregarded. (We refer to the books and records and the defendant's explanation of them.)

In our opening brief we have demonstrated how the government's beginning net worth statement was made up wholly of claimed extra-judicial statements—what the agents said that Chan had said. Cash on hand, accounts receivable, war bonds, value of equipment (upon which a manifestly absurd figure was placed), value of furnishings and personal jewelry, all these assets were proved by this hearsay. On the liability side, the same is true. Every item in the liability column was based on what the agent had said that the defendant had said. And almost all of this evidence was untrue. (Appellant's Opening Br. pp. 63-68.)

Appellee refers to the fact that at the trial in cross-examining the defendant's accountant James SooHoo, it was able by a series of hypothetical questions and assumptions to extract from the witness a negative net worth of \$17,599.00 at the beginning of 1943.

This was a trick designed to, and which undoubtedly did, persuade the jury that the defendant's own witness was convicting him of income tax evasion.

Actually all that the government was doing was re-establishing its own beginning net worth statement as correct *by assuming that all of the extrajudicial statements upon which it was based were true.*

Mr. SooHoo was asked, not to assume that the partnership had terminated, *but that it never had existed.* For example, one of the defendant's principal assets at the beginning of 1943 was an indebtedness owed by the partnership to the defendant for back wages in the sum of \$8,100.00 and other clearing account items of \$4,658.24, a total of \$12,758.24. Now obviously, even if the partnership had been terminated, this debt was not wiped out unless there was some agreement to that effect and there was not the slightest evidence in the record of any such agreement. Yet Mr. SooHoo was asked to assume the non-existence of over \$12,000 in assets. This is merely illustrative of (1) the unfairness of the prosecution and (2) *its determination to keep the case firmly on a basis of trial by confession and not of evidence.*

The beginning net worth of Mr. Chan, the true beginning net worth as shown by the defendant's books and the FACTS elicited at the trial is shown in De-

fendant's Exhibit BB. It shows a beginning net worth of \$15,856.26.

The beginning net worth as claimed by the prosecution and based wholly upon the claimed extrajudicial statements of the defendant to the government agents, uncorroborated by any other fact in the record is minus \$762.78, a difference of \$16,619.04. (Plaintiff's Exhibit 39.) The false net worth statement constructed by the government during the trial through the medium of constituting the accountant James SooHoo, the prosecution's "Charlie McCarthy" and compelling him to assume the truth of the claimed extrajudicial statements relied upon by the prosecution, showed a beginning net worth of minus \$17,599.29 or a difference from the net worth as shown from the other evidence of \$33,455.55.

And yet appellee, without apparent embarrassment says:

"Appellant's income was properly computed on the basis of his increase in net worth." (Appellee's Br. p. 14.)

Appellee also insists that the "net worth" computations of the government made on the basis of extrajudicial admissions were corroborated. (Appellee's Br. p. 21.)

It points to:

- (1) The bank statements of three bank accounts admitted in evidence and stipulated to;
- (2) Various cancelled checks;
- (3) Stipulations covering the purchase of real property.

Appellee concludes:

“In view of this volume of documentary evidence it can hardly be maintained that there was no corroboration for the defendant’s extrajudicial admissions as to the items of assets and liabilities comprising his net worth.” (Appellee’s Br. p. 23.)

Obviously, cancelled checks without any explanation of any kind are NOT corroboration of anything. These cancelled checks WERE as a matter of fact explained by the evidence of the defendant given at the trial and this evidence, far from corroborating the claimed extrajudicial admissions, showed that the checks were issued for wholly different purposes from those claimed by the prosecution. (Appellant’s Opening Br. pp. 60, 61, 62; 69, 70, 71; and see Defendant’s Exhibits AA, BB and CC Appendix.)

It appears to us to be equally obvious that a stipulation by parties of one, two or several items making up a long account can hardly be stated to be “corroboration” of the accuracy of the total account which by the evidence is shown to differ by \$33,455.55 from the claimed extrajudicial admission.

CONCLUSION.

We assert that at this point in the study and review of the evidence there can be no doubt *where the truth lies.*

The Palace Market, a partnership of some twenty-five Chinese, a number of whom are working part-

ners and one of whom has been the manager and sole boss for many years, suffered business reverses during the 30s, saw these reverses multiplied when the boss went to China in 1940. A meeting of the partners was held during his absence and steps were discussed to plug the dike. Jack Chan, the boss, returned; another meeting was held; he was voted back at the helm. In 1941, working partners, discouraged, left the employ. Jack Chan continued to plod along. The war came and with it a measure of prosperity. The defendant, Jack Chan, without bothering to consult his partners, repaid himself his back wages and loans to the business. This, he was entitled to do. He used this money to acquire assets—real property. The total was not enough. So he borrowed from the partnership funds to make up the difference. This he was probably not entitled to do. Then in 1945 and 1946 he commenced to buy his partners out, at purchase prices not based upon the valuations then of the partners' interests but on the basis of their original investments.

This is the truth in this matter. The testimony, records, minutes, letters, agreements, cancelled checks, books, all leave not the slightest doubt of this.

Does this truth, thus stated, constitute the defendant guilty? Obviously not of income tax evasion. The money which he used to acquire his "net worth" in 1945-1946 was not income. There was no termination of the partnership and the money used was not his money, it was the partnership's.

Did the jury believe that the partnership had terminated—a fact which, as we have seen, is the indis-

pensable fact to be proved by the prosecution? Or did it simply fail, or refuse to distinguish between income and "borrowed" funds and convict the defendant for failure to pay income tax on the latter?

It is idle, perhaps, to speculate upon the analysis of this case made in the jury room.

Of course, the fact that each member of the jury had had in his or her possession for a period of 15 days Plaintiff's Exhibit 39 (to the exclusion of all other items of evidence) and had stared at the sum of \$83,113.11 conjured up by the prosecution as the sum accumulated by Mr. Chan from "income" during the four year period, may have speeded them in their analysis.

Perhaps the frequent references to the defendant's black market operations by the United States Attorney was not without its effect also.

Dated, Sacramento, California,

November 20, 1950.

Respectfully submitted,

MULL & PIERCE,

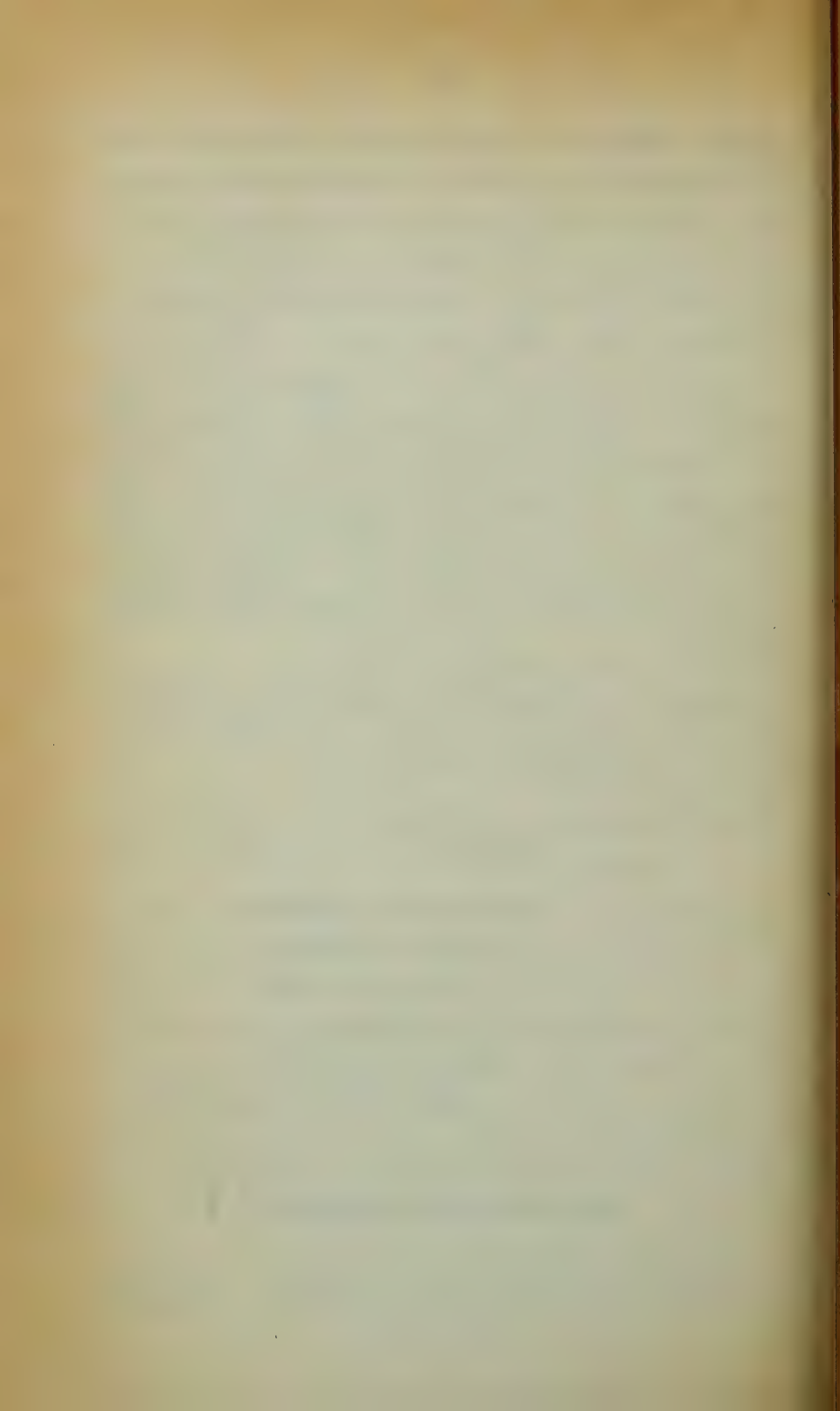
A. M. MULL, JR.,

F. R. PIERCE,

By F. R. PIERCE,

Attorneys for Appellant.

(Appendices A and B Follow.)



Appendices A and B.

Appendix A

“Q. Was their original investment paid back to them when they terminated, when they left the partnership?

A. I pay them * * *

Q. If they left the partnership, did they receive their original investment back?

A. Yes * * *

Devine. There were twenty-five partners in 1945, and there were ten in 1946?

A. Yes, mam.”

(At this point in the statement occurs the following interlineation made by the defendant in his own handwriting.)

“1946 10 partners J. C.”

“Devine. Here I have the names of fifteen partners that were partners in 1945 but were not shown as partners in '46. I'll go down the list and will you tell me how much you paid each one when he left the business in 1945? The first one is Chin Wing * * *” (the witness then proceeded to state the payments and the method of payment.)

“Q. What year did Chin Ling leave the partnership?

A. 1935.*

Q. Were all these partners in 1945? (Pointing to the partnership return for the year 1945.)

*This is an obvious error corrected two questions later, “1945” is intended.

I hand you herewith a partnership return indicating various partners * * * Is this the names of the partners? * * * *Were they members of the partnership in 1945?*

A. *Yes. Yes.*

Q. Let's see; *you have Chin Ling listed. Was he a member of the partnership in 1945?*

A. *Yes.*

Q. Was he a partner in 1946?

A. 1946, no. 1940 I went to China and then '41 all partners, everybody dropped out of business. Nobody wanted to stay in business. Too many bills, and then I take them all. I told partners I will pay everybody. I was working hard and every creditor we pay month by month and year by year everybody. Partners don't want in. I give money back. I pay everybody back for the partner capital. Somebody dropped so I pay back cash. I been here about thirty years, and I don't want to owe anyone. I pay them back because I don't owe one penny. My wife, my whole family work. Everyone, in other words, *now* the business mostly mine, mostly mine. Stay or let them go. We give money back see.

(Without a single question to produce an explanation of this highly ambiguous statement the questioners then continued to question Mr. Chan and he answered regarding the amounts paid to various partners, e.g.)

Devine. Chan Tim. How much did you pay him in 1946?

A. He got \$1,000.00 * * *

Devine. Lai Cung Nam. Was he a partner in 1946?

A. No, I think not * * *

Q. Now all these partners, fifteen of them were repaid for their original investment in 1946, is that right?

A. Yeah, but some partners he draw some money for long time ago, and when some partner he draw some money, and then when we pay back, we don't pay what he draw before.

Q. When you formed the partnership, were all the members residents of the United States at that time?

A. Some were in China, either 1946 some were in China."

Appendix B

Henry Chan.

Henry Chan testified that he had left the employ of the partnership in 1939 to go into business for himself. When he left he had a conversation with Mr. Chan but did not remember what was said in this conversation. (R. 3, pp. 791, 792.) After he left he had a conversation with Mr. Chan about paying him his interest in the partnership. This was after the war period; some time after the war started. (R. 3, p. 793.) It was a very casual conversation and he couldn't remember what Chan said: "I don't think he said he was going to give it to me. That is all." (R. 3, p. 794.) He said that was the first conversation he had had with Mr. Chan about withdrawing his partnership interest. Although he couldn't remember at first being present at the meetings of the partnership held in 1940, he finally identified his signature (Chinese) on the minutes although his recollection had been the meetings were later. (R. 3, pp. 797, 798.)

On cross-examination, he stated that when he left the employ of the partnership he said he wanted to withdraw from the partnership but didn't know whether Jack Chan had consented or not and his partnership interest was never returned. In answer to a leading question by Mr. Seawell, the witness gave a monosyllabic affirmative to a question calling for his opinion that "after the conversation with Mr. Chan" it was "his understanding" that he had "with-

drawn from the partnership''. Whether as an employee or partner was not mentioned. Nor was any portion of any conversation from which such opinion could be drawn expressed. (R. 3, p. 801.)

(The question calling for the opinion and conclusion of the witness was deliberately asked by counsel notwithstanding that the question immediately preceding it in practically identical form was objected to and the objection sustained.)

George Chan.

It is claimed that by impeachment it has been established through Mr. George Chan that the partnership had terminated. Mr. George Chan had been questioned by the agents who followed their usual policy of attempting to ascertain facts by leading questions calling for opinions and legal conclusions:

“* * * as far as you are concerned, you dropped out of the partnership in 1941, is that correct?

A. I call it terminated then.” (R. 3, p. 820, lines 13-25.)

However, when asked to relate facts and not conclusions the witness testified

“* * * before the time when you quit did you have any discussion with Jack Chan about quitting?

A. No sir.

Q. At the time you quit, did you talk with Jack Chan?

A. I did.

Q. Who was present at that conversation?

A. Just me and Jack.

Q. And where did the conversation take place?

A. Palace Market.

Q. Will you state what was said at that time?

A. Oh, I think—I was leaving * * * to go in business for myself. I believe that is what I told him.

Q. * * * and what did he say?

A. Oh, let's see—sorry to see me go, I guess 'Best of luck, or something'.

Q. Did he say anything about the partnership being dissolved at that time?

A. No sir. * * *

Q. When did you first have a conversation with Jack Chan about terminating your membership in the partnership?

A. About 1946." (R. 3, p. 807, line 13—p. 808, line 13.)

(The witness was shown his agreement in writing in March 1945.)

"Q. All right. Now, refreshing your memory from that agreement can you tell me approximately the time that you had a conversation with Jack Chan about quitting the partnership.

A. I believe the matter was handled through Mr. French so if that is the date that was on there, it must be the date I saw Mr. French regarding the matter of dissolving the partnership with him.

Q. * * * Now, did you talk to Jack Chan before you went to see Mr. French?

A. I don't think I did.

Q. * * * But did you have Mr. French handle this for you?

A. Yes sir." (R. 3, p. 809, line 12—p. 810, line 3.)

Harry Young.

Let us now test appellee's claim that Harry Young testified "*definitely*" that *he thought* he was out of the partnership in 1941.

The following is his testimony:

"A. * * * I know I got a partnership with Jack Chan. (R. 3, p. 830, line 21.)

A. * * * I worked there for the partnership for a little while. (R. 3 p. 831, line 4.)

Q. * * * Do you remember when Jack Chan returned from China in 1940?

A. Yes sir.

Q. Did you have a meeting with him after he returned?

A. Yes, sir.

Q. And whereabouts?

A. Palace Market.

Q. * * * Did you have a conversation with Jack Chan, talk to him about buying out your interest?

A. Uh uh (negative).

Q. Did you have any talk at the meeting about getting rid of the partnership?

A. We don't say much at that time. (R. 3, p. 831, lines 7-22.)

* * * * *

(The witness having testified to a meeting which he thought was in 1941 (actually in 1940) testified:

Q. What did you say at that meeting?

A. I don't say nothing. I sit down that is all. I tell you the truth.

Q. * * * and what did the other people say at that meeting?

A. People say 'Put Mr. Chan on pricing* job' that is all.

Q. During that time did Mr. Chan agree to buy you out, your interest in the partnership?
* * *

A. No I didn't get no money in 1941.

Q. * * * Did he agree to buy that in 1941 from you?

A. I don't know that, he don't tell me about it. * * *

Q. Did you ever agree to sell that to him?

A. Yes, I sign.

Q. When?

A. I forget when, what year I sign. (R. 3, p. 833, line 18 — p. 834, line 15.)

Q. * * * Your interest in the partnership ended in 1941?

A. No, I don't say that.

Q. Didn't you say that?

A. No.

* * * * *

Q. Isn't it true that your interest did end in the partnership in 1941?

A. Not true, yes in 1941.

Q. Didn't you get out of the partnership in 1941?

A. I don't know, that time I say nothing.

* * * * *

*We think he meant "present".

Q. But didn't you think you were out of the partnership?

A. I thought myself, I thought I was out, that is all." (R. 3, p. 838, line 13—p. 839, line 13.)

(The witness then discussed the letter which is Defendants Exhibit K and which is set forth in the Appellant's Opening brief p. 21 and in which is dated January 11, 1947 and which speaks of a present interest of Young in the partnership and requests Jack Chan to buy him out.)

"Q. You wrote this letter?

A. No, my friend.

Q. You never wrote this?

A. No, I no write good, I not understand good, my friend write it.

Q. Did you tell him what to say in there?

A. Yes." (R. 3 p. 840, lines 6-12.)

No. 12,596

IN THE

United States Court of Appeals
For the Ninth Circuit

CHAN SHING HO, also known as Jack
Chan,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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A. M. MULL, JR.,
F. R. PIERCE,

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*Attorneys for Appellant
and Petitioner.*

FILED

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No. 12,596

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CHAN SHING HO, also known as Jack
Chan,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable The United States Court of Appeals for the Ninth Circuit:

Appellant petitions the above entitled Court for a rehearing and in support of said petition respectfully shows:

I. GROUNDS FOR THIS PETITION.

It is respectfully urged:

(a) That the Court erred in holding that ANY evidence at all which is admissible is sufficient to justify a jury in bringing in a verdict of guilty in a criminal case; that it erred in stating that the evidence in the record justifies an inference "that all but appellant abandoned their interests or withdrew

from the enterprise"; that it erred in holding that the evidence justified the jury in determining that there had been a termination of the partnership in or after 1941.

(b) That the Court erred in holding that the government is justified in proving a case of income tax evasion on the net worth theory under the facts shown in this case.

II. ARGUMENT.

A. THE EVIDENCE UPON WHICH THE COURT RELIES TO SUPPORT THE JURY'S VERDICT HERE IS INSUFFICIENT. THE PROSECUTION HAD THE BURDEN TO PROVE THE DEFENDANT'S GUILT TO A MORAL CERTAINTY AND BEYOND A REASONABLE DOUBT. THE EVIDENCE CITED FALLS FAR SHORT OF THAT QUALITY OR QUANTITY.

This being a criminal case, the burden on the Government was to establish to a moral certainty and beyond all reasonable doubt that the defendant was guilty of income tax evasion. If the evidence was not sufficient to establish this then the appellant is entitled to a reversal.

A verdict cannot be sustained merely because there was some evidence which was admissible (and some admitted which was not) if that evidence considered with all of the evidence in the record was not sufficient to have justified reasonable persons to have found the defendant guilty to a moral certainty.

We submit that there was no evidence direct or circumstantial in this case which could have established to a moral certainty that "all but the appellant

abandoned their interests or withdrew from the enterprise" during the period in question.

There isn't even sufficient evidence to have gotten beyond a nonsuit in a civil action brought to establish such a termination of a partnership.

The defendant did not say the partnership had terminated in 1941. The statement which he did make as quoted in the Court's opinion: "Nobody wanted to stay in business. Too many bills, and then I take them all" when construed in the light (a) that the working partners quit their employment in the period from 1939 to 1941 (Appellant's Reply Brief p. 9), (b) that in five other places in the same statement the appellant said he had 10 partners in 1945 (Appellant's Reply Brief Appendix pp. i, ii), (c) that when the statement was submitted to him to correct he repeated this (Appellant's Reply Brief Appendix p. i), (d) that the statement is made by an inarticulate Chinese; makes no such construction of the statement reasonable. Certainly not sufficient to justify a conviction in a criminal case.

Had the defendant made a statement flatly asserting that the partnership terminated in 1941 and then at another time made another statement denying it, the jury might reasonably conclude that the assertion was the truth and the denial was untrue. But where a witness—especially an inarticulate Chinese—makes an ambiguous declaration and as a part of the same statement states over and over again that in 1945 he had 10 partners, no one can reasonably believe that he intended by his ambiguous statement to tell his in-

quisitors that the partnership had terminated in 1941. If that is proof of the fact beyond a reasonable doubt then truly the phrase has lost all rational meaning.

We have already argued that statements by two of the partners that they “understood” or “thought” they were out of the partnership are statements of conclusions. We cited authorities on pages 11-13 of appellant’s reply brief to support the contention. Without reference to authority the Court has held that such statements are statements of fact.

We respectfully submit that the only facts testified to by these witnesses were as follows:

Henry Chan testified that he had left the employ of the partnership in 1939 to go in business for himself. He had no conversation with Mr. Chan about selling his interest in the partnership then nor until some-time after the war. When he did talk about it defendant said he didn’t think he would buy him out. (Appellant’s Reply Brief Appendix B p. iv.)

George Chan’s testimony was that when he left the employ of the partnership nothing was said about its dissolution, and that as far as he was concerned there was no dissolution until he negotiated with Mr. Chan in March 1945 and a written agreement was made by his lawyer Mr. French. (Appellant’s Reply Brief Appendix B p. v.)

Harry Young, another partner testified to the following FACTS: that he knew he was a partner; that he had worked for the partnership for a little while; that he attended a meeting of the partnership in 1940

at the Palace Market; that when he left the partnership employment nothing was said about a termination of the partnership. (Appellant's Reply Brief Appendix B, pp. vii, viii, ix.) That on January 11, 1947 he wrote a letter to Chan stating that he had a present share in the partnership and asking Chan to buy him out then. (Appellant's Opening Brief p. 21.)

Lai Ching Low was the next partner to testify. He is a San Francisco merchant. He was one of the original partners. He attended the partnership meeting in October 1940. He confirmed the facts as shown by the minutes of the transactions at that meeting. He testified that from the date of that meeting until the present there had never been any conversation, writing, act or deed constituting a termination of the partnership until 1947 when his interest had been bought out by the defendant.

The further fact that these partners attended a partnership meeting in 1940 and transacted partnership business and elected Mr. Chan manager of the business shows that there could have been no termination of the partnership when two of these same partners had expressed the *opinion* that they "thought" or "understood" themselves out of the partnership when they left its employ.

It is quite obvious that "thinking" yourself out of a partnership does not terminate the partnership. A partnership is terminated by (1) intent of the partners plus (2) acts which constitute a winding up of its affairs.

Assuming that the statement of opinions, upon which the Government, and now the Court, relies is sufficient evidence to justify the verdict of guilty of the jury, to be statement of facts, all that the evidence establishes is an intent—an expressed intent, negatived by every fact in the record.

One of the elements necessary to establish a termination of a partnership is still unproved, namely, an act or series of acts and deeds constituting a termination in fact and in law.

No matter how astutely and closely the evidence in the record is sifted there is no evidence whatever which establishes (either to a moral certainty or otherwise) any act sufficient to terminate an existing partnership.

The so-called circumstantial evidence is not evidence pointing to such acts at all.

It is said: “* * * circumstances point strongly to the nonexistence of the partnership in the crucial years.”

1. The first circumstantial evidence pointed to is “After 1940 no partnership meeting was called and no financial statements issued”.

How this points to a termination is beyond us. *Before* 1940 no meetings of the partnership were held and no financial statements were issued. The only reason partnership meetings were called in 1940 was because of Mr. Chan's absence in, and return from, China when he was placed again in complete charge and control of the market. The writer has been deal-

ing with business partnerships in a legal capacity for some twenty-eight years during which time as far as we can recall we have yet to hear of a formal partnership meeting being called by any partnership.

2. The opinion states: "Throughout the later period appellant conducted the market precisely as though it were wholly owned by himself. He managed the store and signed all the checks."

We respectfully submit that the evidence shows that throughout *the whole period of the existence of the partnership* from 1925 onward appellant conducted the market as though he owned it *except* during the latest period commencing in 1945 when various partners opened negotiations with Mr. Chan and were bought out one by one by contracts in writing, or after letters in writing, or as shown by the cancelled checks—all of which evidence *conforms exactly* to the piecemeal termination of the partnership as shown by the partnership income tax returns filed by the appellant. Therefore in this respect the circumstantial evidence is directly contrary to the Court's finding. If the manager of a meat market which is admittedly a partnership in 1941 continues to operate it in 1942, 1943 and 1944 exactly as he had operated it from 1925 to 1941 and then in 1945 and 1946-1947 he buys out various partners' interests, how can it be said that the manner of operation is circumstantial evidence of a termination? How can it be said that any significance attaches to the signing of checks when Mr. Chan *had always signed checks* (excepting when he was in China and temporary arrangements were made

for others to sign); when in any large partnership the managing partner usually signs checks?

3. It is stated “* * * Although admittedly the business was highly profitable during the years under consideration, he distributed no profits to any of the alleged partners and informed none of them that there were profits to be distributed. Nor did any of the supposed partners make any returns.”

Does this show any ACT constituting a termination of the partnership? It DOES show that Mr. Chan appropriated partnership profits to his own use and it does show perhaps a wrongful failure to keep the partners informed and settle with them. It might even show an intent to hide profits from partners. But a circumstance which points strongly to a misappropriation of partnership funds can hardly be said to prove any act constituting a termination of the partnership—to a moral certainty and beyond a reasonable doubt or otherwise.

The Court says: “On the whole showing the jury were entitled to conclude that the profits he took were rightfully his.” In the face of a record replete with dealings in 1945-1946 buying out partners as of that time and of the complete absence of any evidence showing an ACT of termination we do not see how such a conclusion can reasonably be drawn. To do so one would have to pile up inferences upon inferences.

B. THE COURT ERRED IN HOLDING THAT THE GOVERNMENT CAN PROVE A CASE OF INCOME TAX EVASION ON THE NET WORTH THEORY UNDER THE FACTS SHOWN IN THIS CASE.

From the outset of the investigation by the Government agents the defendant gave complete cooperation, turned over his complete set of books, in which there was a record of every transaction of the business during the whole of the period in question. Nothing was missing. The whole financial picture was there.

The special agents of the Government, stating that the books were inadequate but presenting no proof of the fact, disregarded all of the books completely and made out a case of income tax evasion based in all of its essential details upon what the agents said the defendant taxpayer has said about his assets and liabilities.

Many of these hearsay statements were shown to have been completely and admittedly incorrect.

Thus in this case, for the first time in any reported case that we have read we have the following situation:

The Government has been permitted to base a case of income tax evasion upon a "net-worth expenditure" basis (which is merely a series of asset and liability balance sheets) which balance sheets rest in all of their essential details (including "beginning net worth" and the statement of assets and liabilities throughout the period) upon what an agent has testified the taxpayer told him; in short, upon extrajudicial admissions. And this where the information has

been conclusively proven to be incorrect in numerous instances and also where in so presenting the case a complete set of books has been disregarded.

If this method of prosecution is upheld, it will establish a very dangerous precedent in income tax evasion jurisprudence. It will completely destroy the *corpus delicti* rule as applied to such cases. It will also shift the burden of proof in income tax evasion prosecutions.

The Court has stated: "No authority has been cited for this proposition" (i.e., the proposition that in a case like this the method is improper).

We have cited the case of *United States v. Chapman* (C.C.A. 7th Ct., June 18, 1948), 168 F. (2d) 997, where the Court says:

"Appellant contends that 'In a net worth case the starting point must be based upon a solid foundation and a Revenue Agent's statement of the defendant's oral admission or confession when uncorroborated is not sufficient to convict. We fully agree with this statement of the law.'" (Appellant's Opening Brief p. 117.)

The Revenue Agent's statement of the defendant's oral admission uncorroborated has been enough to convict in *this* case. There is not the slightest evidence concerning most of the items constituting Mr. Chan's beginning net worth in the record save and excepting the Revenue Agent's statement of what Mr. Chan is claimed to have told him. (Appellant's Opening Brief p. 63.)

The rule above quoted from the *Chapman* case has been disregarded; and the *Chapman* case is not even mentioned.

The next case that we cited was *Bryan v. United States* (1949), C.C.A. 5th Ct., 175 F. (2d) 223, holding that the net-worth expenditures method of proving income tax evasion can only be used where the computations of net worth at the beginning and end of the period can be accepted as being reasonably accurate. (Appellant's Opening Brief pp. 118, 119.)

Here the record shows conclusively that the evidence of beginning net worth as produced by the prosecution was grossly inaccurate (as we recall in oral argument certain of these inaccuracies were admitted) e.g., the value of equipment was listed at \$22,009.50, its actual value being \$500.00; various debts were included which were not then owed. (Appellant's Opening Brief pp. 67, 68.)

Thus the holding of the *Bryan* case has been disregarded, and the *Bryan* case is not even mentioned.

The next case that we cited was *United States v. Fenwick* (Nov. 1949), C.C.A. 7th Ct., 177 F. (2d) 488. (Appellant's Opening Brief p. 119.) In that case the Government used the "net-worth expenditure" method and relied on the testimony of extrajudicial admissions through the medium of having special agents testify to what the taxpayer was supposed to have told them.

This is just what was done here.

In our opening brief we quoted from the Court's opinion holding (1) That the Government must by competent evidence prove beyond reasonable doubt that the crime charged has actually been committed. (2) That the conviction cannot stand unless there is proof of the *corpus delicti*, existence of which cannot be established by an extrajudicial admission. (3) That in a net worth case the starting point must be based upon a solid foundation, the defendant's oral admissions being insufficient, citing *U. S. v. Chapman*, supra. (Appellant's Opening Brief p. 119.)

The ruling in the *Fenwick* case has not been followed by the Court here in its opinion. The facts in the *Fenwick* case are closely similar to the facts here. The methods of proof by the Government were identical. The case is not even mentioned.

As we have shown above the only evidence supporting substantially all of the figures used by the Government in constructing the net worth balance sheet which was the basis of the prosecution were extrajudicial admissions of the accused.

We have devoted many pages of our briefs to the citation of authorities that convictions based upon extrajudicial admissions and convictions cannot stand. (Appellant's Opening Brief pp. 95 et seq.; pp. 116 et seq.; Appellant's Reply Brief pp. 18 et seq.)

These authorities are not mentioned nor the point discussed in the Court's opinion. We believe the authorities are controlling in this case.

C. CONCLUSION.

In our Appellant's Reply Brief p. 6 we asserted the proposition "A mere scintilla of evidence is insufficient to support a verdict. The prosecution does not sustain its burden unless the evidence is sufficient to justify men and women of ordinary reason and fairness to find the defendant guilty to a moral certainty and beyond a reasonable doubt." We firmly believe and reassert that proposition to be sound law and applicable here.

After analysis this case reduces itself to this:

That the defendant has been found guilty of income tax evasion where the only proof of the all-important fact determinative of the issue, namely the termination at some unstated and indefinite time between 1941 and 1944 of a business partnership admittedly existing from 1925 to 1940 is:

(1) An extrajudicial admission of the defendant that "nobody wanted to stay in business. Too many bills, and then I take them all" made as a part of a written declaration that "in 1945 ten partners".

(2) The conclusions by two of the partners that they "understood" or "thought" they were out of the partnership by 1939 or 1941—where the record shows when they were stating facts and not opinions that no ACT occurred whatever from which they could draw this conclusion and also showed that they attended meetings of the partnership and participated in partnership affairs after they "understood" or "thought" they were out.

(3) Circumstantial evidence which shows acts and behavior by the defendant exactly the same as his acts and behavior during the period when admittedly the partnership was still in existence; acts which point to the conclusion that the defendant misappropriated his partner's funds but which do not even remotely point to any act which could be shown under the law to constitute a termination of a partnership.

It appears to us to be quite clear that these admissions and inferences upon inferences do not constitute enough proof of termination of a partnership so that a plaintiff in a civil action seeking to establish a termination of a partnership could even present a *prima facie* case of such termination.

It appears most certain to us that such proof falls far short of that quality and quantity which should be the minimum to support a verdict of guilty in a criminal case.

Of perhaps even more public importance is the invitation which the opinion in this case now extends to special agents of the United States Government to continue the practice begun here—to cast aside all other evidence and proof and present tax evasion cases upon the following formula or recipe:

(1) First obtain verbal or written extrajudicial admissions from the taxpayer;

(2) Interpret them as self-interest and the conscience of the agent may dictate;

(3) Obtain by independent means any single independent item of evidence of any asset or liability (to pay lip service to the *corpus delicti* rule).

With this formula—given an inarticulate Chinaman as the victim and a special agent so careless of the accuracy of his recollections that he finds the Chinese language written in dialects—all Constitutional safeguards to protect an accused become mere forms without substance.

Dated, Sacramento, California,

February 23, 1951.

Respectfully submitted,

MULL & PIERCE,

A. M. MULL, JR.,

F. R. PIERCE,

*Attorneys for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL

F. R. PIERCE does hereby certify:

That he is an attorney at law duly authorized to practice in the United States Court of Appeals for the Ninth Circuit; that he is one of the attorneys of record and counsel for Chan Shing Ho, also known as Jack Chan, the Appellant in the within action; that he is the author of the within and foregoing Petition for Rehearing after judgment by said Court affirming the judgment of conviction of the United States District Court for the Northern District of California. That in the judgment of said F. R. Pierce said Petition for Rehearing is well founded and it is not interposed for delay.

Dated, Sacramento, California,
February 23, 1951.

F. R. PIERCE,
*Of Counsel for Appellant
and Petitioner.*

